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PLEADABLE BRIEVES
AND
JURISDICTION IN HERITAGE
IN LATER MEDIEVAL SCOTLAND

Hector L. MacQueen

Doctor of Philosophy
University of Edinburgh
1985.



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I regret that the following relevant works were published too late for me to take them into account: A. Grant, Independence and Nationhood: Scotland 1306 - 1469 (London, 1984); A.A.M. Duncan,

'James I 1424 - 1437' (2nd ed., University of Glasgow, Scottish History Department Occasional Papers, 1984); A. Harding, 'Regiam Majestatem amongst medieval law books', Juridical Review 29 (1984) 97 - 111. Part of the third chapter has been published as 'Dissasine and mortancestor in Scots law', Journal of Legal History 4 (1983) 21 - 49; this article is bound in as Appendix I. Material from the thesis has been used in my articles 'The brieve of right in Scots law', Journal of Legal History 3 (1982) 52 - 70 and 'Jurisdiction in heritage and the lords of council and session after 1532', Miscellany II (Stair Society, volume 35) 61 - 85.

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ABSTRACT OF THESIS.

Despite the scarcity of source material and the difficulty of interpreting such evidence as exists, it is clear that the development of royal justice led to the emergence of a unified common law in medieval Scotland. This was achieved although no structure of central courts like that of England emerged until the fifteenth century. Instead royal justice was administered by courts based in the localities such as those of the sheriff and the burghs, or by courts such as those of the justiciar which went on circuit through the kingdom. Within this structure there operated from the thirteenth century a rule that actions concerning the recovery of land from intruders had to be raised by pleadable brieves. There were various types of such writs; the relevant ones were the brieves of dissasine and mortancestor, pleadable in the justiciar's court, and the brieve of right, pleadable in the sheriff and burgh courts. It appears that round these brieves there developed a considerable body of law, and at least some of them remained in use until the sixteenth century. It is against this background that the exclusion of the developing 'central' courts of the fifteenth century from cases concerning fee and heritage, or landownership, must be considered. These courts developed as a method of handling the judicial functions of parliament and the king's council. To begin with these functions were confined to the supervision and correction of the ordinary courts of the common law, but by the mid-fifteenth century the jurisdiction of council in particular as an alternative forum was established in most areas other than that of fee and heritage. This limitation, it is argued, continued because the common law still required that pleadable brieves (which were not addressed to either parliament or

council) be used to commence actions of that kind. Only when the pleadable briefes had fallen into desuetude in the first half of the sixteenth century did the council come to have jurisdiction in fee and heritage.

Chapter One

Introduction

(a) Scope of Thesis

Law and its administration in medieval Scotland has on the whole been an under-researched subject. For at least a century and perhaps longer few Scottish lawyers have seen much need to press their researches any further back than the seventeenth century Institutions of Stair. When reference has been made to earlier sources, it has seldom been with a view to elucidating their historical significance in the development of the law. Medieval historians have been similarly reluctant to come to grips with the topic. There are many reasons for this. Unlike the lawyers, the historians have well appreciated the real difficulties of the source material, which make it very hard to say what the law was at almost any given point in the middle ages, and virtually impossible to offer any narrative account of its substantive development throughout the period. Historians have also tended to shy away from the more abstruse technicalities of the law as lying beyond the scope of their training and competence.

What the historians have succeeded in doing, however, has been to draw our attention to the development of the institutions which administered the law in medieval Scotland, the courts. Most notably Professor Dickinson in three volumes published by the Scottish History Society gave detailed attention to the sheriff, baron and burgh courts, building his discussion around some of their earliest

surviving records.¹ The court of the medieval regality has also been the subject of a work based on the record of one such court, by Messrs. Webster and Duncan.² More recently the history of the justiciar's court has been the subject of two articles, one a short general sketch by Professor Dickinson, the other a detailed study of the twelfth and thirteenth century material by Professor Barrow.³

For the period after 1300,⁴ the conclusions drawn about the administration of justice by these courts have not been enthusiastic ones. Lord Cooper wrote of 'a rather chaotic welter of ill-defined and overlapping jurisdictions - the Justiciar, the Deputes for the Justiciar, Lords of Regality, the sheriffs and the barons ... administering [rules of law] in the spirit to be expected in a land which was in a chronic state of disturbance, where life was cheap and relics of the blood feud still survived, and where everything within the Highland line was literally beyond the pale'.⁵ He

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1. The Sheriff Court Book of Fife 1515 - 1522 (Scottish History Soc., 3rd series, vol. 12, 1928); The Court Book of the Barony of Carnwath 1523 - 1542 (Scottish History Soc., 3rd series, vol. 29, 1937); Early Records of Aberdeen 1317; 1398 - 1407 (Scottish History Soc., 3rd series, vol. 49, 1957).
 2. The Regality of Dunfermline Court Book 1531 - 1538 (Dunfermline, 1953).
 3. W.C. Dickinson, 'The High Court of Justiciary', in Introduction to Scottish Legal History ed. G.C.H. Paton (Stair Soc., vol. 20, 1958) 408 - 412; G.W.S. Barrow, 'The Scottish justiciar in the twelfth and thirteenth centuries', JR 16 (1971) 97 - 148, reprinted in a collection of the author's papers, The Kingdom of the Scots (London, 1973) 83 - 138. Henceforth the latter version will be cited, as 'Barrow, Kingdom'.
 4. Most writers agree that the system worked well in the twelfth and thirteenth centuries: see Barrow, Kingdom, 86 - 9.
 5. T.M. Cooper, 'The dark age of Scottish legal history 1350 - 1650' (19th David Murray Lecture, Glasgow, 1952), reprinted in his Selected Papers 1922 - 1954 (Edinburgh, 1957) 219 - 236, at 234.

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uttered these remarks as part of a lecture entitled 'The Dark Age of Scottish Legal History 1350 - 1650', in which he also said:⁶

This was unquestionably the period when Scots Law, viewed as a science and a philosophy from the comparative standpoint, reached its low-water mark; and it is not easy to see why it should have sunk so low unless the explanation is that the executive remained so impotent and the courts so inferior in capacity and efficiency for so prolonged a period that they gradually dragged the substantive law down to their own level.

These pessimistic comments were echoed by Professor Dickinson in his lecture delivered only a few months after that of Lord Cooper.

Speaking of the period from the reign of Robert I (1306 - 1329) forward, he said:⁷

[N]ow franchisal privileges grew, flourished, and were assumed, unchecked. Now, too, the office of sheriff had become largely heritable in the houses of the nobility; and the ayres of the justiciars (which in earlier times had checked and supervised the inferior courts) were often in abeyance, or held only here and there at wide intervals of time ... Chroniclers and poets in the fifteenth century are at one that the laws are not put to execution and that justice is delayed and denied; the records abound in pious exhortations that justice must be done without fraud or favour to any man, clearly implying that that was not then the case. In effect the courts of the judges ordinary no longer gave justice to those who, under the feudal law and administration, were bound to look there for right and remedy.

What may be termed the Cooper/Dickinson view of later medieval law and administration has been very largely accepted by historians and lawyers up to and including recent times and has been taken as part of the essential background to the emergence of a 'central' court from the judicial activities of the king's council in the

6. Cooper, Selected Papers, 230.

7. W.C. Dickinson, 'The administration of justice in medieval Scotland', Aberdeen University Review 34 (1951 - 2) 338 - 351 at 345.

fifteenth century. Unable to obtain justice in the inefficient courts of the sheriffs, barons and justiciars, people turned to the king and his council and the increasing quantity of business there compelled the establishment of a new institution to deal with it. The new institution became in the fulness of time the Court of Session and thus a new unity was brought to the administration and ultimately also to the content of the law.⁸

There have however been some few voices dissenting from the thesis of a 'Dark Age' of Scots law in the fourteenth and fifteenth centuries. As early as 1956, Sheriff McKechnie commented that 'while there are dark patches I think the description 'The Dark Age' is unfortunate'.⁹ More recently J.J. Robertson offered a reappraisal of the medieval period as a whole, arguing that it should be seen as one in which an 'archaic' legal structure, with 'an hierarchic system of courts, staffed by officials rather than professional lawyers', developed into a 'mature' one of which the 'main characteristic is professionalism'. In his view the later medieval period should be seen as one of progress to such a mature system, rather than one of retrogression and decline from the earlier structure. For Robertson the legal institutions established in the twelfth and thirteenth centuries - the courts of the justiciars, sheriffs and barons - exemplify the 'archaic' character of Scottish government at that period. The evidence for the development of

8. For recent examples of this view see R. Nicholson, Scotland: The Later Middle Ages (Edinburgh, 1975) 311, 383 - 4, 426 - 31; N.A.T. Macdougall, James III : A Political Study (Edinburgh, 1982) 99, 203 - 4; T.M. Chalmers, 'The king's council, patronage and the governance of Scotland 1460 - 1513' (Aberdeen Ph.D., 1982) 297. So far as the 'Cooper/Dickinson view' has been extended back to the twelfth and thirteenth centuries, see Barrow, Kingdom, 86 - 9.

9. H. McKechnie, 'Judicial process upon briefs 1219 - 1532' (23rd David Murray Lecture, Glasgow, 1956) 19.

'maturity' is the rise of a central court, efforts to improve the administration of justice, the legislative activity of parliament and the professional, lawyerly skills which lie behind each of these phenomena.¹⁰

But as Robertson himself acknowledges 'archaic' elements were still to be found in fifteenth century Scots law. It is of course important to avoid the supposition that the terms 'archaic' and 'mature' are intended to have much more than a descriptive function in Robertson's argument, but it is clear that he sees the developments thus defined as representing progress and improvement. It is part of the purpose of this thesis to demonstrate the continuing significance and importance of the so-called 'archaic' elements of medieval Scots law in the legal structure of the later medieval period, and to discuss the nature of their relationship with the development of one of the symptoms of 'maturity', the emerging conciliar court. In the process, it will be shown that the courts derided by Cooper, Dickinson and their followers and described as 'archaic' by Robertson were in fact capable of developing and administering a significant body of law and that the rise of a new judicial institution from the king's council must be seen against that background, rather than one of backwardness and legal primitivism.

The subject is a very broad one and what follows does not attempt to cover all the relevant ground. Instead it is approached through consideration of two rules of jurisdiction, one of which was laid down by statute in 1318 but had already been operative for many

10. J.J. Robertson, 'The development of the law', in Scottish Society in the Fifteenth Century ed. J.M. Brown (London, 1977) 136 - 152, esp. at 139 - 40.

years, and the other of which constituted an important restriction on the competence of the developing 'central' courts of the fifteenth century. Both concerned jurisdiction to try cases regarding title to land. The first of them can be summarised as laying down that no-one in possession of lands could be ejected therefrom except by court action commenced by a pleadable breve. The second rule was that cases concerning 'fee and heritage' should be heard by the judge ordinary and not by the 'central' courts, the auditors of parliament and the lords of council. Anyone reading the printed records of these bodies will quickly become familiar with their practice of remitting matters of fee and heritage to the judge ordinary. This obviously constituted a fundamental jurisdictional limitation which was not superseded even after the emergence of the lords of council and session on a quasi-institutionalised basis in the 1490s. Historians studying the developing institution in the belief that it was conceived as some sort of supreme court to bring good order to the administration of justice have been puzzled by this restricted jurisdiction.¹¹ Their general view is well summarised by Professor Dickinson:¹²

The exclusion from the jurisdiction of the "Lords of Council and Session" of actions relating to "fee and heritage" was the only feudal victory; only the one basic feudal concept still survived - that a plea relating to the holding of land must be heard in the court of the lord of whom the land is held.

No writer on the subject appears to have observed the significance in this matter of a document printed last century by the Historical

11. See e.g. Acts of the Lords of Council 1496 - 1501 edd. G. Neilson and H.M. Paton (Edinburgh, 1918) xlv; Acta Dominorum Concilii 1501 - 3 ed. J.A. Clyde (Stair Soc., vol. 8, 1943) xxxvii.

12. Dickinson, 'Administration of justice', 350.

Manuscripts Commission in one of its Scottish reports. It is worth setting out in full:¹³

This is the answer that we, Wylzame the Grame, Richard the Grame and Henry the Grame, makis tyll our soverayne lorde the kyngis letter, the quhylke chargyt us to compeyr the xii day of July tyll answar apoun the landis of Hutton and to bryng wyth us charteris and documentis to schow. And in the fyrst, we clame the sayde landis wyth thair pertynence our fee and herytage, and haf beyne this hundreth yeris and more, and we in pesabyll possessioun this xx yeris, and we understande that he that is yer and day in peseabyll possessioun in any lande demande it of fee and herytage he aucht nocht to ga owte of his possessioun forowte the kyngis brefe pledabyll; and we understande that our soverayne lorde the kyngis counsale is na courte to plede for na herytage na lyfe na lym in: Quharfor we beseke our soverayne lorde the kyng for the lufe of Gode that of his mychty majeste that he walde kepe us as we that ar his pure legis unwrangyt [in] oure lyfis and in oure lande in any other wayis bot as the course of commoun law wyll and at we may byde befor our jugegis ordynar as the ordur of law of Scotland wyll.

This document formed part of the muniments of the family of Edmonstone of Duntreath, Stirlingshire. After being inventoried by the Historical Manuscripts Commission, the muniments were deposited in the Scottish Record Office in Edinburgh, where they remained until 1980. Then that part of the collection which included the above document was sold in 1980. Some documents relating to Temple lands were sold to the Order of the Knights of St. John; the rest, including our document, were sold to an unknown buyer. A microfilm was taken before the sale and has been retained in the Register House, but owing to export regulations this will not be made available to the public until 1988.¹⁴ It has thus not been possible to examine the original document, which might prove helpful in determining its date. In the

13. Historical Manuscripts Commission Reports on Various Collections v 77.

14. The document formed part of SRO, GD 97/3; the microfilm is SRO, RH 4/124/1. For the sale to the Knights see The Knights of St. John of Jerusalem in Scotland edd. I.B. Cowan, P.H.R. Mackay and A. Macquarrie (Scottish History Soc., 4th series, vol. 19, 1983) lxxix.

Commission report it was assigned to the fourteenth century, but no grounds for this were stated. It may be tentatively suggested that the date is too early, since it was only in the fifteenth century that it became common for documents relating to litigation to be in the vernacular rather than Latin. The parties and the lands in question remain unidentified. In 1510 the lands of Meikle Hutton in Dumfriesshire were said to have belonged to William Graham of Mackeswray before being appraised by the king and sold to John lord Maxwell.¹⁵ But this is the only evidence of Grahams of Hutton known to me and it is not clear why the petition of a small Dumfriesshire family should have found its way into the Duntreath muniments. Regrettably therefore it is not possible to say anything very specific about the date or provenance of the document.

The importance of the document lies in its explicit connection of the two rules on pleadable briefs and fee and heritage, suggesting that the limitation of the jurisdiction of the central courts came about, not through the application of some 'feudal concept', but as a consequence of a rule of law going back to the thirteenth century and embodied in an act of 1318.

It has long been recognised that land and its ownership was the most important kind of dispute in which medieval courts could be called upon to adjudicate. Consequently it would be strange to find that, if the development of a central court was intended to remedy the decline of a fragmented law and legal system, a rule of that discredited system was allowed to operate for many years to restrict the new court's jurisdiction. On the other hand, if we posit a system of courts

15. Registrum Magni Sigillii Regum Scottorum edd. J.M. Thomson and others (Edinburgh, 1882 - 1914) ii no. 3522.

that was well established and worked within a known framework of law and jurisdiction, then we must look at the central courts in a new way: not as a device to supersede the existing structure, but as something supplemental or additional to it.

What follows therefore is mainly a study of these two rules of jurisdiction and an attempt to show the connection between them, with a view to setting the rise of the central courts firmly in the context of later medieval law and its administration. The first chapter shows that in the later medieval period there were frequent references to a secular common law, the administration of which was the responsibility of the king and his officers. These officers, who included the justiciars, the sheriffs and the provosts and bailies of the burghs, held their courts in the name of the king. This is followed by a detailed discussion of the justiciary in the fourteenth and fifteenth centuries, arguing that it played a far more active and significant role in legal administration than has hitherto been allowed. This chapter thus enables us to take seriously the argument that within the older 'archaic' structure of courts it was possible for substantive law to be administered and indeed to develop.

The next two chapters consist of detailed analysis of the rule regarding pleadable briefes, showing evidence for its continued force up to at least 1400 and moreover for the use of the relevant briefes, those of dissasine, mortancestor and right, into the sixteenth century. This is followed by a chapter discussing the nature of the jurisdiction of the 'central' courts - parliament, council general and council - in which it is argued that it was indeed supplemental to the ordinary processes of the common law and that its most significant development in the fifteenth century was a shift of jurisdiction and business to

the council so that it became an alternative to the ordinary courts in all but fee and heritage cases. In the next chapter it is shown that there is no direct connection between the fee and heritage rule and the rule on pleadable briefs, but that there was a complex link bound in with the development of conciliar jurisdiction described in the previous chapter.

Lastly the various threads of argument are brought together in a chapter of conclusions.

(b) Sources

One of the principal difficulties inhibiting research on medieval Scots law is the state of the sources. Many of the types of source which legal historians of other countries use for this kind of work are not available to, or are not readily usable by their Scottish colleagues. It thus behoves one essaying research in the field to state the materials he has used and his reasons for using them. They may be divided into four broad categories: (i) Court Records; (ii) Legislation; (iii) Legal Treatises and Formularies; (iv) Comparative Legal History.

(i) Court Records

In the period with which this thesis is primarily concerned - c.1250 to c.1500 - it is only in the last hundred years or so that the records of any court begin to become available in any quantity. That such records once existed admits of little doubt and this is not the place to discuss the reasons for their non-survival.¹⁶ The earliest

16. See B. Webster, Scotland from the Eleventh Century to 1603 (Cambridge, 1975) 160 - 3 for valuable comments.

surviving continuous records are those of the burgh courts.¹⁷ Of sheriff court records, there is a tantalising fragment from Inverness of late 1456 and then nothing else until the beginning of the sixteenth century.¹⁸ Similarly some parts of the justiciary records for the 1490s survive, but only in the sixteenth century do they become continuous.¹⁹ For baronies and regalities we have nothing before 1500.²⁰ It follows therefore that the compilation of a medieval Civil Judicial Statistics is an impossible task and that we must look to sources other than the archives of the courts themselves for most of our evidence about their activities in the medieval period.

The places in which to look for such material have been well demonstrated by Lord Cooper, Sheriff McKechnie, Professor Duncan, Professor Willock and Professor Barrow.²¹ We may preface our discussion by quoting McKechnie's remark that 'the Dark Age ... is

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- 17. D. Robertson and M. Wood, 'Burgh court records 1319 - 1834', in Sources and Literature of Scots Law ed. H. McKechnie (Stair Soc., vol. 1, 1936) (henceforth 'SLSL') 98 - 110.
 - 18. C.A. Malcolm, 'Sheriff and other local court records 1385 - 1935', in SLSL, 111 - 132.
 - 19. S.A. Gillon, 'Criminal law', in SLSL, 370 - 378.
 - 20. Malcolm, 'Sheriff court records', cited above, n.18.
 - 21. See the following works: T.M. Cooper, Select Scottish Cases of the Thirteenth Century (Edinburgh, 1944); McKechnie, 'Brieves'; A.A.M. Duncan, 'The central courts before 1532', in Introduction to Scottish Legal History, 321 - 340; I.D. Willock, The Origin and Development of the Jury in Scotland (Stair Soc., vol. 23, 1966); Barrow, Kingdom, 83 - 138. All use 'charter' evidence to elucidate legal practice.

only dark to those who have not searched for the light that is hidden under the bushels in our charter rooms'.²² Many private muniments contain documents which record or refer to litigations involving former owners of those muniments. This is especially true where the litigation concerned ownership of land, because then the decision of the court would constitute most valuable evidence of title, to be prized and cherished. Frequently therefore the successful party would request the court to produce a statement of its decision for him, or obtain the services of a notary to record it in a notarial instrument. Such documents are undoubtedly to be classed as official court records and taken together can permit us to outline the operation and work of the courts in various fields. Frequently too the examination of other documents in these muniments and elsewhere - charters, indentures, instruments - makes it possible to see something of the nature of the dispute behind the litigation and to suggest what the legal and factual issues were. And if we assume, as we are entitled to do, that what little we now see typifies what can no longer be seen, then this kind of material enables us to draw more general conclusions about the law and its administration in the period.

Another useful source is central government records: the register of the great seal and the financial records of the exchequer and, latterly, the treasurer. Because the administration of justice was such an important part of royal government, these records contain many references to the king's courts, their profits and their expenses, as well as material throwing light on litigations of which we know

22. McKechnie, 'Brieves', 19.

from other sources. Some of these records stretch back as far as the thirteenth century, but it is important to bear in mind that great parts of them have not survived and that we know of other parts only by the good fortune that copies of now lost originals were made at some point by zealous antiquarians such as Lord Haddington.²³

In this discussion of court records I have purposely left the records of the 'central' courts to the last. They survive from 1466 to 1496 in the case of the parliamentary auditors, from 1478 on in the case of the king's council. The former really belong with the records of parliament, despite their treatment as something separate by Thomas Thomson when he published them as The Acts of the Lords Auditors of Causes and Complaints in 1839, and the remarks in the next section concerning parliamentary records before 1466 may be referred to. Council also kept records before 1478 but for our knowledge of cases before it in that period we are reliant once again upon the type of material already discussed above. But it should be noted that there also exist a number of documents which declare themselves to be extracts (or copies of the relevant entries) from the council records. From 1478 on we have the records themselves, printed in various forms under various editorial hands to 1503, and in manuscript in Register House.²⁴ Selections of the record after 1503

23. See generally J.M. Thomson, The Public Records of Scotland (Glasgow, 1922) 14; Webster, Scotland, 132 - 151; G. Donaldson, The Sources of Scottish History (Edinburgh, 1978) 10 - 15.

24. See Thomson, Public Records, 33 - 4; R.K. Hannay, 'Early records of council and session 1466 - 1659', in SLSL 16 - 24; Donaldson, Sources, 16. The editions of the council records are Acts of the Lords of Council in Civil Causes 1478 - 1495 ed. T. Thomson (Edinburgh, 1839); Acts of the Lords of Council in Civil Causes 1496 - 1501 edd. Neilson and Paton (Edinburgh, 1918); Acta Dominorum Concilii 1501 - 3 ed. Clyde (Stair Soc., vol. 8, 1943).

have been published by R.K. Hannay and by the Stair Society,²⁵ but otherwise the sheer quantity and bulk of the material, unindexed as it is, makes it all but impossible to use in a systematic way over a long period of time. Again the record is not complete, so that, despite its impressive bulk, statistics compiled from what survives may be misleading. In using the printed editions too one must be careful; it has been shown that Thomas Thomson misdated at least one section of the record by five years.²⁶ It also seems certain that when the record was restored and rebound in Register House in the nineteenth century, certain important data may have been lost.²⁷ An eighteenth century report on the 'state of the Records of Scotland' observed of the council records that 'from the year 1488 to 1495 there were two different registers of decreets kept, probably each of the two sessions by themselves'.²⁸ That two such registers did exist seems confirmed by two inventories of 1676 and 1701.²⁹ They have now

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25. Acts of the Lords of Council in Public Affairs 1501 - 1554 ed. R.K. Hannay (Edinburgh, 1932); Acta Dominorum Concilii et Sessionis 1532 - 1533 ed. I.H. Shearer (Stair Soc., vol. 14, 1956).
 26. A.A.M. Duncan and M.P. McDiarmid, 'Some wrongly dated entries in the Acts of the Lords of Council', SHR 33 (1954) 86 - 88.
 27. On the early nineteenth century restoration and rebinding of the council records under Thomas Thomson, see M.D. Young, 'The age of the deputy clerk register 1806 - 1928', SHR 53 (1974) 157 - 193 at 162 - 3.
 28. Abstract of the state of the Records of Scotland reported by Thomas Ker on the 18 November 1757 to a meeting of lawyers and writers (NLS MS. no. 2948) ff. 22 - 3.
 29. The 1676 inventory (SRO 1/4) describes volumes as follows: one from 20 July 1488 - 5 March 1491, one from 15 June 1491 - 28 August 1495 (items 4 and 6); one from 23 February 1489 - 21 May 1491, one from 9 July 1491 - 15 May 1495 (items 3 and 5). These volumes are also described in the 1701 inventory (SRO 1/6) and by Ker.

been run together, presumably under Thomson.

The records themselves both of council and of auditors are succinct notes 'recording the various stages of a lawsuit'.³⁰ It has been said that they offer little of value to the legal historian,³¹ but in fact careful reading will produce a good deal of information about individual cases. The identities of the parties and the cause of action are usually specified; what is most often missing is the grounds upon which the court reached its decision in the case. Moreover the picture thus built up can be supplemented with detail derived from other sources in the fashion described for cases from other courts. It is fortunate that the period for which the records of council and the auditors have been printed in full - 1466 - 1503 - is precisely that in which the central court which became the Court of Session took on something like its eventual form. There has however been no detailed investigation of the material contained in the printed volumes to determine such matters as the development of its jurisdiction in this crucial period. Because the evidence is accessible and easily used this thesis concentrates on the period up to 1503; investigations of the record after that date have not been systematic but have rather depended on following up clues provided in other sources to be discussed later in this chapter.

(ii) Legislation

The survival of the records of parliament in both its legislative and judicial functions is patchy before 1466, from which year they run,

30. Chalmers, 'King's council', 203 - 4.

31. Cooper, Selected Papers, 222 - 3.

more or less complete, down to 1707. For the earlier period, we have two rolls of the parliaments of John Balliol, three of David II and two of Robert II. However, although so little of the early original record remains, transcripts and printed editions of lost sections do survive, giving us further well authenticated information about the activities of parliament and the closely related council general between 1290 and the mid-fifteenth century.³²

Going further back, into the twelfth and thirteenth centuries, we enter much less certain terrain. Later medieval legal collections attributed legislation to Malcolm Mackenneth, David I, William I and Alexander II; but although we know that David and William did enact certain laws, it is far from clear that they or the other kings were responsible for the statutes subsequently assigned to their reigns.³³ Before such attributions can be accepted they must be subjected to careful scrutiny. Even then the best conclusion may well be a 'not proven' verdict.

The same collections also contain statutes of Alexander III, Robert I, David II, Robert II and Robert III. Again these statutes generally have no authentication beyond their self-attribution to a particular reign, and their reliability as evidence of a legislative act at a given point in time is minimal. The important exception

32. Thomson, Public Records, 29 - 30; Webster, Scotland, 128 - 30. For recent additions to legislative material see W.C. Dickinson, 'The acts of the parliament at Perth 6 March 1429/30', SHR 29 (1950) 1 - 12; A.A.M. Duncan, 'Councils general 1404 - 1423', SHR 35 (1956) 132 - 143 and I.E. O'Brien, 'The Scottish parliament in the fifteenth and sixteenth centuries' (Glasgow Ph.D., 1980) ch. 1 and appendices.

33. See T.M. Cooper, 'Early Scottish statutes revisited', JR 64 (1952) 197 - 203, reprinted Selected Papers, 237 - 243; A.A.M. Duncan, 'Regiam Majestatem : a reconsideration', JR 6 (1961) 199 - 217 at 206 - 10. For references to legislation of David I, Malcolm IV and William I see RRS i no. 233, RRS ii nos. 71, 124, 281, 406, 442, 475; Arbroath Liber i no. 229.

to this general statement is a collection of acts said to have been laid down by a parliament of Robert I in 1318, authenticated by their transcription, presumably at the behest of Bernard de Linton, the king's chancellor as well as abbot of Arbroath, into the register of the abbey of Arbroath.³⁴

Most of the legislative material relevant to this thesis is gathered in the first two volumes of the Record edition of the Acts of the Parliaments of Scotland, and it is to this collection, rather than those such as Glendook's which lawyers are accustomed to use, that reference is normally made for the texts and dates of statutes.³⁵ Only by taking material which is authenticated as historical evidence are we likely to achieve some understanding of the thinking and legislative purpose which lay behind the acts of parliament when they came into force. Even so, much of the material presented in the Acts of the Parliaments of Scotland, particularly that in the first volume, must be treated with the greatest caution and subject to an awareness of the difficulties just outlined.

(iii) Legal Treatises and Formularies

In the previous section mention was made of the later medieval collections of legal material. These survive in some forty³⁶ manuscripts of different periods from the fourteenth to the end of the sixteenth centuries. In addition to legislation, they contain a number of treatises dealing with various branches of the law and

34. Thomson, Public Records, 28.

35. The Acts of the Parliaments of Scotland edd. T. Thomson and C. Innes (12 vols., Edinburgh, 1814 - 1875). For 'lawyers' collections' of Scottish statutes see Lord Thankerton, 'The statutory law', in SLSL, 3 - 15.

36. The number given here is ex. inf. Mr. W.J. Windram. For descriptions of some of these MSS., see APS i 177 - 210.

sometimes styles of documents in common use such as briefes.

Despite the obvious importance of these manuscripts to the history of medieval Scots law, there are many obstacles at present to their use. Accounts of these difficulties are relatively plentiful; here it is intended to touch only upon the points relevant to this thesis.

Virtually all the manuscripts contain texts of the works known as Regiam Majestatem and Quoniam Attachiamenta. It now seems certain that both were initially compiled in the fourteenth century.³⁷ It is clear that they were the most important works on Scots law in the fifteenth century. In 1425 they were described by parliament as 'the bukis of law of this realme' and there are other statutory references to Regiam in the fifteenth century which demonstrate its status as the most authoritative treatise of the period.³⁸ Similarly there is evidence of the citation of passages in Regiam and Quoniam before fifteenth century courts,³⁹ as well as a reference to 'the books of the laws' in an arbitration of 1456.⁴⁰ No doubt the 'books' included not only Regiam but also Quoniam and perhaps the Liber de Judicibus, another work found in many of the manuscripts.⁴¹ Because the English

37. See Duncan, 'Regiam Majestatem', passim; cf. P.G. Stein, 'The source of the Romano-canonical part of Regiam Majestatem', SHR 48 (1969) 107 - 123. The dating of the first compilation of Quoniam to the fourteenth century seems uncontroversial.

38. APS ii 10, c. 10; APS ii 100, c. 9; APS ii 111, c. 4.

39. SRO, Ailsa Muniments, GD 25/1/102 (Appendix H); Fraser, Lennox ii no. 62; Cawdor Bk., 104.

40. Aberdeen - Banff Ill. iii 8.

41. On the Liber see 'A forgotten source of Scots law', Scots Law Times (1941) News section, 21, an unsigned article by T.M. Cooper.

work Glanvill was a major source for the compiler of Regiam, the authenticity of the latter as a representation of Scots law has sometimes been doubted; but it is clear that, whatever the original position, by the fifteenth century, Regiam was regarded as an authoritative statement of the law. It stretches credibility to suppose that the work could have achieved this status if, to begin with, it was not in some way an attempt at an account of the law of Scotland.

This thesis has been composed in the belief that Regiam is a statement of the law which held authoritative status in Scotland in the fourteenth and fifteenth centuries and that this was also true of the slightly later Quoniam.⁴² Accordingly both works may be referred to as evidence of the state of the law during that period. But while such an approach may be justified in general terms, it remains important to be aware of the considerable difficulties which then arise. There are no texts which can be marked off as constituting 'official' or 'authorised' versions of either Regiam or Quoniam. The variety of versions of legal texts in circulation was already creating problems in the fifteenth century⁴³ and continued to do so until Sir John Skene completed his edition of the 'auld lawes' in 1609. In modern times two versions of Regiam and Quoniam have been produced which perhaps give a misleading impression that there actually did exist

42. From various points it seems that Quoniam represents Scots law at a later stage of development than does Regiam. For example, unlike Regiam, it deals with the brieve de proteccione regis infricta.

43. In 1473 parliament laid down that 'thare be a buke maid contenand at the lawis of this realme ... and nane other bukis be usit but the copy of it'. This was 'for the gret diversite now fundin in divers bukis put in be divers personnis that ar callit men of law (APS ii 105, c. 14). Was this the outcome of the 1469 proposal that 'the kingis lawis, Regiam Maiestatem, actis, statutis and uther bukis be put in a volum and .. be autorizit and the laif to be distroyit' (APS ii 97, c. 19)? Nothing is known to have come from either enactment.

a single text of each, somehow discoverable through the maze of variations found in the manuscript. The maze is part of the reality of medieval law; the modern scholarly text a device to enable the researcher to approach that reality.

The variations of the texts are usually emphasised to explain the difficulties of handling the evidence of Regiam and Quoniam. Nevertheless it is possible to see the main substance of both works if not necessarily their exact wording (if any), capitular order, or date of composition. It was on this basis that Skene compiled his editions of 1609.⁴⁴ These have been much criticised but there has been only one serious attempt to do better, by Thomas Thomson and Cosmo Innes. Their editions form part of the first volume of the Acts of the Parliaments of Scotland, but unfortunately lack a detailed apparatus criticus.⁴⁵ Most recently Lord Cooper virtually reproduced Skene's texts for the Stair Society, his one concession to the criticisms of Skene being the interpolation of additional material from and cross-references to the work of Thomson and Innes.⁴⁶ From all this we may glean the substance of Regiam and Quoniam, while acknowledging that as yet we lack a truly critical knowledge of the works and their development.

For the purposes of this thesis the Thomson/Innes editions of Regiam and Quoniam have been used in preference to those of Skene and

44. On Skene's editions of 1609 see T.M. Cooper, 'Regiam Majestatem and the auld lawes', in SLSL, 70 - 81.

45. See APS i 597 - 659. The 'Table of Authorities' (APS i 211 - 273 at 232 - 245) gives some idea of the material on which the editors worked.

46. Regiam Majestatem and Quoniam Attachiamenta ed. T.M. Cooper (Stair Soc., vol. 11, 1947).

Cooper, and references to either should be followed up in the first volume of the Acts of the Parliaments of Scotland.⁴⁷ There are two main reasons for this. First and foremost, the Thomson/Innes editions are the only ones worked out by recognised scholarly principles. Secondly it appears probable that the editors chose to base their texts on the earliest manuscripts:⁴⁸ that is, those produced in the period with which this thesis deals and when the status and use of both works was probably greatest. With Thomson and Innes we are surely nearer to the Regiam and Quoniam used in the fourteenth and fifteenth centuries.

There are fewer problems with the collections of styles of briefes which may also be found in the manuscripts. There are three main collections (all now printed in more or less satisfactory form)⁴⁹ apart from those which form what may be described as an 'appendix' to Quoniam in the Thomson/Innes edition.⁵⁰ While there is no warrant for speaking of a 'Register of Briefes' comparable to the English Registrum Omnium Brevium, it does appear that the collections as we now have them were first put together in the reign of Robert I, perhaps on some official basis, and added to subsequently as necessary.⁵¹

47. References to the texts of either Skene or Cooper in this thesis are indicated by 'Skene, Regiam' or 'Cooper, Regiam' as appropriate.

48. See J. Buchanan, 'The manuscripts of Regiam Majestatem', JR 49 (1937) 217 - 231 at 224 - 5.

49. The Register of Briefes 1286 - 1386 ed. T.M. Cooper (Stair Soc., vol. 10, 1946); Formulary E : Scottish Letters and Briefes 1286 - 1424 ed. A.A.M. Duncan (University of Glasgow, Scottish History Department Occasional Papers, 1976).

50. For these, see Quoniam Attachiamenta chs. 49 - 61. In the Skene and Cooper editions these styles are incorporated in the text at appropriate points.

51. Formulary E, 1 - 2.

Some limited use has been made in the thesis of other material contained in the legal manuscripts, either directly or from other printed collections based on the manuscripts. Prominent among these are Skene's collection of the 'auld lawes', which includes much more than the texts of Regiam and Quoniam, and Balfour's Practicks, which appears to represent an attempt of c. 1579 to digest the 'auld lawes' manuscripts alongside the decisions of the lords of council and session and the acts of parliament.⁵² These may be usefully compared with the 'fragmenta collecta' which form the last section of the first volume of the Acts of the Parliaments of Scotland.⁵³ The so-called 'fragmenta' are in fact extracts from various sources within the manuscripts. Only by checking with the table of authorities prefixed to the volume⁵⁴ and also with Balfour and Skene can it be discovered that in compiling the 'fragmenta' the editors broke up treatises contained within the manuscripts, or printed some parts of these works while omitting others altogether. This treatment has served only to deepen the difficulty of approaching the evidence contained in the manuscripts, but it is possible to make some sense of it by the process of checking and cross-referencing just mentioned.

Finally, post-medieval works have been referred to in the research for this thesis. Skene's 'auld lawes' and Balfour's Practicks fall into this category, of course, but have been discussed above mainly because

52. See H. McKechnie, 'Practicks 1469 - 1700', in SLSL, 25 - 41 at 31 - 3 and the introduction to the Practicks of Sir James Balfour of Pittendreich ed. P.G.B. McNeill (2 vols., Stair Soc., vols. 21 and 22, 1962, 1963).

53. APS i 719 - 754.

54. See APS i 211 - 273; see also the 'Notice of the Manuscripts', APS i 177 - 210.

they embody medieval source material. Nevertheless, as already mentioned, Balfour also digests a large number of the decisions of the lords of council and session, some from the fifteenth century, most from the sixteenth. Given the problems of research in the council and session records referred to earlier, Balfour is a valuable guide to significant decisions of the court and thus amongst other things to the development of its jurisdiction.⁵⁵ But it needs to be remembered that we do not know the reasons for the choice of authorities to be inserted in the Practicks; for example, whether it reflects any theory of precedent, such as the relative binding force of a single decision as contrasted with that of a chain of concurring decisions. Further the accuracy of Balfour's terse summaries of decisions must be tested against the original record.⁵⁶

Attention has recently been drawn to other practicks of the sixteenth century for the value of the guidance they give to the work of the court. By contrast with those of Balfour, these practicks record only decisions of the lords, and were kept by members of the bench, presumably to aid the court to achieve consistency in its cases. The earliest of these appear to be the practicks of John Sinclair, which cover the period 1540 to 1549.⁵⁷

Two further works require mention, both of a quite different nature from the practicks. In 1597 Sir John Skene published

55. Donaldson, Sources, 17.

56. McKechnie, 'Practicks', 33, 34.

57. McKechnie, 'Practicks', 29 - 30; A.L. Murray, 'Sinclair's Practicks', in Law Making and Law Makers in British History ed. A. Harding (Royal Historical Society, 1980) 90 - 104.

De Verborum Significatione, a by-product of his work on the medieval legal manuscripts which took the form of a dictionary of the 'difficill wordes and termes' to be found therein. It is therefore a very useful guide, not only to the language of medieval law, but also to the manuscripts themselves. Again however the work must be treated critically, against an independent examination of the source material. The Jus Feudale of Sir Thomas Craig of Riccarton was probably written at about the same time as the date of publication of De Verborum. Its value for our purposes lies in the fact that it is the first detailed treatment of a topic of substantive law which lies at the heart of this thesis, namely, land law, and also in that the subject was approached from an historical point of view. The accuracy of Craig's law and history has been questioned⁵⁸ and undoubtedly his work must be examined with care; but frequently his is the earliest substantive discussion of particular legal subjects, so that he provides a good starting point for investigation of their earlier history.

Later legal writers offer little of value to the student of medieval law. Stair, Mackenzie, Bankton, Erskine and Bell were chiefly concerned with providing accounts of contemporary law for practising lawyers. They constitute primary sources only for the law of their own time. By the eighteenth century the discipline of legal history had begun to emerge and the works of such as Kames on medieval law are its first fruits.⁵⁹ But these cannot be regarded

58. McKechnie, 'Practicks', 33 - 4; A.C. Black, 'The institutional writers 1600 - 1826', in SLSL, 59 - 69 at 61 - 3; J.J. Robertson, 'The illusory breve testatum', in The Scottish Tradition : Essays in Honour of Ronald Gordon Cant ed. G.W.S. Barrow (Edinburgh, 1974) 84 - 90.

59. E.g. his Historical Law Tracts (Edinburgh, 1757).

as evidence in the study of medieval law; they and all subsequent studies are secondary accounts based on assessments of the primary evidence.

(iv) Comparative Legal History

The foregoing account of the sources for the study of medieval Scots law has sought to show the fragmentary nature of the evidence and the problems in treating it. As a result writing an account of the law has something of the character of a children's puzzle: there are numerous dots which if joined correctly by lines will produce a recognisable picture. The primary evidence provides us with the dots and perhaps some of the lines; from what source do we obtain the clue which will enable us to draw the remainder of the picture?

The conclusion that the development of Scots law in the twelfth and thirteenth centuries was much influenced by the law of England has impressed itself upon all who have made a study of the subject. If F.W. Maitland went too far when he remarked that although English law 'had no power north of the Tweed ... we may doubt whether he who crossed the river felt that he had passed from the land of one law to the land of another',⁶⁰ it is clear that processes of legal transplantation did occur between the two kingdoms during the period. But the consensus of opinion has been that this came to an end with the outbreak of war between Scotland and England in the 1290s. This is stated in extreme form by Dr. J.H. Baker:⁶¹

The percolation into Scotland of Anglo-Norman feudalism and sheriffs, justiciars and the writ system raised the possibility that Scotland might have become the first

60. F. Pollock and F.W. Maitland, History of English Law before the time of Edward I (2nd ed., reissued Cambridge, 1968) i 222.

61. J.H. Baker, Introduction to English Legal History (2nd ed., London, 1979) 31.

common law country outside England. War ended that possibility ... [I]ntellectual contact with England was broken for centuries ... [T]he result was a fragmented confusion of custom and Canon law.

However difficulties in the way of such views are immediately apparent. If Regiam is a work of the fourteenth century and an attempt at an account of contemporary Scots law, then it follows that in the compiler's mind the English work Glanvill continued to be of considerable relevance in that law.⁶² In an important article published in 1966 Professor Harding has argued that the developments of English and Scots law are closely comparable throughout the medieval period;⁶³ he has subsequently suggested that the comparisons may also be made with developments in other European states.⁶⁴ Most recently it has been pointed out that those parts of the law which Stair in the seventeenth century described as 'ancient and immemorial custom' had been brought to Scotland in the twelfth and thirteenth centuries and were discussed in Regiam Majestatem.⁶⁵

In this thesis much use will be made of comparative material from England and, to a much lesser extent, from elsewhere. This is not to suggest that Scottish courts and lawyers habitually referred to English materials in the fourteenth and fifteenth centuries. At least in relation to land law both systems were founded on Norman

62. Duncan, 'Regiam Majestatem', 216 - 7.

63. A. Harding, 'Medieval briefs of protection and the development of the common law', JR 11 (1966) 115 - 149.

64. A. Harding, 'Plaints and bills in the history of English law', in Legal History Studies 1972 ed. D. Jenkins (Cardiff, 1975) 65 - 86, especially at 82 - 3.

65. W.D.H. Sellar, 'English law as a source [of Stair's Institutions]', in Stair Tercentenary Studies ed. D.M. Walker (Stair Soc., vol. 33, 1981) 140 - 150 at 144 - 6.

customs, which were first embodied in writing in Glanvill. It is clear that this work at least was of great importance in Scotland. The basic conceptual structures of what became Scots and English land law were thus virtually identical; as we shall see, the remedial structures were also closely related. The copious English material however allows us to see the processes of legal reasoning at work within these structures, something almost invisible to the researcher in the Scottish evidence. Applying what is known of English law often helps to make sense of what we can see in Scotland.

The need to make comparisons with English law becomes all the more apparent when it is recognised that the two jurisdictional rules at the centre of this thesis had their precise equivalents in England. The rule that no man needed to answer for his free holding except by the king's writ is one of the best known and most important parts of medieval English law. The rule that conciliar courts had no jurisdiction in cases concerning freehold particularly affected the later medieval courts of Chancery and Star Chamber. It has been little discussed by legal historians and has usually been ascribed to a sequence of fourteenth century statutes.⁶⁶ However none of these really appear to be the origin of the rule; they are rather recognitions that such a rule existed. The only legal historian to discuss a possible connection with the other rule was Professor T.F.T. Plucknett, the leading authority between the time of Maitland and the present generation on the development of English law in the later

66. See J.F. Baldwin, The King's Council in England During the Middle Ages (Oxford, 1913) 279; Select Cases before the King's Council 1243 - 1482 edd. I.S. Leadam and J.F. Baldwin (Selden Soc., vol. 35, 1918), xxvi; W.S. Holdsworth, History of English Law (London, 1966 reprint) i 487 - 9.

middle ages. He had no doubt that the requirement of an original writ in cases of freehold operated to restrict the jurisdiction of the king's conciliar courts.⁶⁷ It seems clear from this that comparison of the English and Scottish rules will prove a fruitful exercise.

There is less need to justify reference to the other major legal system of influence in medieval Scotland, the canon law. Quite apart from the canonical monopoly of matters pertaining to ecclesiastical jurisdiction, it has frequently been acknowledged how much Scottish court procedures owe to Romano-canonical ideas.⁶⁸ This subject is further explored in the course of the thesis. One major point is that the language of procedure in the secular courts was clearly borrowed from canon law; the nature of the borrowing of the actual rules of procedure was however a more complex process than seems to have been realised hitherto.

In brief the function of the comparative excursions in this thesis is to flesh out the bare bones of our surviving native sources. In a sense part of the argument is that such comparisons, especially those with English law, are justifiable and helpful in understanding the development of later medieval Scots law. But I have not sought to make comparisons with the native laws of medieval Ireland and Wales.⁶⁹ The subject matter of this thesis is land law, which was

67. T.F.T. Plucknett, Concise History of the Common Law (5th ed., London, 1956) 176 - 7.

68. E.g. by Robertson, 'Development of the law', at 151 - 2, and his 'Canon law as a source [of Stair's Institutions]', in Stair Tercentenary Studies, 112 - 127 at 119 - 120; S.D. Ollivant, The Court of the Official in Pre-Reformation Scotland (Stair Soc., vol. 34, 1982) 130 - 3.

69. That such comparisons may be fruitful in appropriate areas is suggested by e.g. W.D.H. Sellar, 'Marriage, divorce and concubinage in Gaelic Scotland', Transactions of the Gaelic Society of Inverness 51 (1981) 464 - 493.

a development of the feudal customs and tenures of Anglo-Norman rather than Celtic society. No doubt Celtic social structures and customs lurk behind the feudal language and form of our documentary evidence on land-holding, probably at a much later date than is often realised; but the fact that such disguise was necessary shows how truly feudal was the common law relating to land.

(c) References

Abbreviations used in this thesis in referring to primary source material in general follow the styles suggested in the supplement to the October 1963 issue of the Scottish Historical Review. A full list will be found in the bibliography. References to Regiam Majestatem and Quoniam Attachiamenta are to the editions found in the first volume of the Acts of the Parliaments of Scotland, unless otherwise indicated. In the case of Regiam references are by book and chapter, in Quoniam, by chapter. References to the English treatises known as Glanvill and Bracton are by those titles. I have used the modern editions of, respectively, G.D.G. Hall and S.E. Thorne. In Glanvill, references are by book and chapter, in Bracton, as is the usual convention, by the foliation of the first printed edition; but in the latter case, I have added in brackets references to the volume and page numbers of the Thorne edition. Abbreviated references to secondary sources are explained in the bibliography. Page numbers are given without prefix; all such numbers may be taken as page references except in the case of periodical articles which are cited by journal name, volume number, year and pages. All other volume numbers are given in Roman numerals. Other numerical references are given an appropriate prefix - 'f' for 'folio', 'no.' for 'number'.

Chapter Two

The Curia Regis, Royal Justice and the Common Law

(a) Royal Justice and the Common Law

In 1607 King James the sixth of Scotland, the first of Great Britain, assured the House of Commons that the Scots had a very different concept of 'fundamental law' from that of the English. They used this phrase, he observed, 'not meaning as you do their Common Law for they have none but that which is called Jus Regis'.¹ There was some unintended element of paradox in this distinction of the Common Law from the King's Law, since undoubtedly the former had its origins in the exercise of royal authority in the medieval period. James was of course speaking in the era of Coke when the Common Law was becoming a symbol of opposition to the tyranny of the prerogative power of monarchs, as the law of the land to which all must bow. But in the middle ages, when the state depended far more upon the figure of the king for its basic political unity, it was impossible to divorce the idea of the law of the land from the activity and authority of the king. Hence in the late twelfth century treatise ascribed to Ranulf de Glanvill, the writer identified 'the laws and customs of the realm' or 'the laws of England' with the rules observed and enforced in the king's courts.² It was only in the reign of Edward I (1272 - 1307) that it became usual to refer to the law of the realm, the law administered in the king's courts, as the common law;³ but it followed from the fact that the king

1. The Political Works of James I ed. C.H. McIlwain (Cambridge, 1918) 329.

2. Glanvill, prologue.

3. Pollock and Maitland, History of English Law i 177.

alone had authority over the whole of the kingdom that in secular affairs only his courts could apply the law which was common to all the subjects within that kingdom.

To begin with, it seems, the king's courts in England were used only in exceptional or important cases, but their business expanded, notably from the reign of Henry II (1154 - 1189) onward, taking in an ever wider range of subject-matter as a matter of course. Thus gradually the king's courts became a forum for the ordinary administration of justice, and the rules they applied the general law of the land. Despite the comment of King James, a somewhat similar development may be traced in Scotland in the period 1100 - 1300, when there seems to have been steadily increasing royal activity in the administration of justice. Again the earliest evidence suggests that the king's intervention in legal disputes was the exception rather than the rule. So for example royal charters of the twelfth century granting franchisal jurisdiction refer to the availability of royal justice, but only if the beneficiary of the grant should fail to provide justice himself in his own court.⁴ This seems to suggest that the norm of the twelfth century was the non-royal court; but there were many factors making their first appearance in Scotland at this time which laid the base for change and development.

The increasingly 'feudal' structure of government, for example, implied that the king, like any other lord, should hold a court of and for his tenants-in-chief. Such a court can be seen in action from the reign of David I (1124 - 1153) onward, although the

4. Lawrie, Charters nos. 74, 179 and 209; RRS i nos. 222 and 262; RRS ii nos. 39 and 197.

description 'curia regis' does not appear in surviving evidence until the reign of William the Lion (1165 - 1214).⁵ But the work of his curia regis was not confined to the function of adjudication as we should recognise it; it was also a place where land might be formally granted by the king or where it might be resigned back into his hands.⁶ Indeed, even in contentious matters, its function seems more often than not to have been to confirm quit-claims and compromises between the parties, rather than to determine their respective rights.⁷ It looks as though the imprimatur of confirmation by the king's court lent especial strength or binding force to such agreements, and parallels may be made with the institution of the 'feet of fines' in England. One might even ask whether the forms of adjudication in this period grew out of the forms of conveyancing rather than vice-versa, as is usually stated; certainly the surviving evidence gives the impression that William's curia was principally concerned with the formalities of transferring title to land.

In all this the curia regis is recognisably the fore-runner of the thirteenth century colloquium, and thus also of the Scottish parliament.⁸ But as Professor A.A.M. Duncan has argued, there is no reason to suppose that the principal function of these institutions was a judicial one. Parliaments or colloquia were sessions of the king's council, doing the king's business, and while that business

5. Lawrie, Charters nos. 130 and 182; for 'curia regis', see nn. 6 and 7 below. See also RRS ii nos. 35 and 105.

6. RRS ii nos. 85 and 496.

7. RRS ii nos. 236, 249, 364, 483, and 519. For adjudications by the 'curia regis', see RRS ii nos. 84, 353 and 440.

8. For the thirteenth century colloquia and parliaments as judicial bodies see H.G. Richardson and G.O. Sayles, 'The Scottish parliaments of Edward I', SHR 25 (1928) 300 - 319.

undoubtedly included judicial work, it probably always consisted mainly of 'political discussion and decision'.⁹ We may infer that this observation would be likely to hold true for the king's council in the twelfth century also from the emergence of the office of justice or justiciar (henceforth 'justiciar') in the reign of David I.¹⁰ It is apparent that it was introduced to do some of the king's judicial work, for both David and Malcolm IV (1153 - 1165) refer to hearings before the king or his justiciar as being alternatives of equivalent authority.¹¹ To underline this vice-regal role of the justiciar there is a reference to a court held before Roland son of Uchtred, justiciar perhaps of Galloway in the 1190s, as 'curia domini regis'.¹² It may be that the institution was evolved to cope with the growing number of 'new men' in Scottish society at this period: that is, the Anglo-Norman knights, the burgesses and the religious men of the various monastic houses, most of whom owed their presence in Scotland to royal patronage and who would certainly have expected to receive the protection of royal justice. Perhaps it is significant that two royal charters giving the right to be sued only before the king or his justiciar were grants to a burgess and to an ecclesiastical foundation respectively.

9. A.A.M. Duncan, 'The early parliaments of Scotland', SHR 45 (1966) 36 - 58 at 57.

10. See generally Barrow, Kingdom, ch. 3, esp. at 84.

11. Lawrie, Charters no. 248; RRS i nos. 121 and 220.

12. APS i 378. For Roland as justiciar of Galloway see RRS ii 45 and Barrow, Kingdom, 107 and 138. But cf. Duncan, Making of the Kingdom, 203 - 4.

There are at least two thirteenth century references to the justiciar's court as curia domini regis, in 1221 and 1247 respectively.¹³ Other courts were similarly described in this period; for example, one held before the chamberlain at Forfar in 1228, while we may also note what appears to be a description of Berwick burgh court as curia domini regis, probably in the thirteenth century.¹⁴ A document from the reign of Alexander II, probably of date 1233 x 1235, refers to another case in the 'curia domini regis apud Berwic in plano comitatu'. The case was begun by royal brieve addressed to the sheriff of Berwick and this, together with the reference to the 'full county', makes it certain that it is his court, rather than that of the burgh, which is being described as the king's court here.¹⁵ The sheriff and burgh courts had emerged in the reign of William I, if not before, and their development may again be attributed to the presence of the new men mentioned above and their claim to the protection of royal justice.¹⁶ But it is important to notice that in none of the examples above is there any suggestion of the king being present in the court and it seems that in Scotland as in England that is not necessarily implied by the use

13. Fraser, Douglas iii no. 285; Raine, North Durham no. 126.

14. Arbroath Liber i no. 229; Kelso Liber i no. 34.

15. Durham Dean and Chapter Muniments, misc. ch., no. 1273 (Appendix A).

16. The earliest references to the sheriff court are c. 1200 (Dryburgh Liber no. 223 and RRS ii 42); to the burgh court in 1212 (Melrose Liber i no. 27 and Aberdeen Burgh Recs., xxii and 1). See also Duncan, Making of the Kingdom, 481 - 2 and G.W.S. Barrow, Kingship and Unity (London, 1981) 46 and 99.

of the phrase 'curia regis'. The implication to be drawn is rather that the court was held in the king's name by a royal officer exercising royal jurisdiction.¹⁷ The growth in the number of such courts in the twelfth and thirteenth centuries can surely be taken as a sign of a corresponding development in the regularity with which royal justice was used throughout the kingdom.

Undoubtedly in the thirteenth century there was recognition of the existence of a body of law which could be described, for example, as 'the laws and customs of the realm' or as 'the law and assize of the realm' or even as 'the laws of David', referring to the twelfth century king.¹⁸ Moreover there are a number of interesting references to 'the common law' in contexts which suggest close parallels to the use of that phrase in England. But before going into the details of these references, it is worth pausing momentarily to consider the phrase itself and to remember that it was used first in the middle ages, not by lawyers in the English royal courts, but by the canonists who were seeking 'to distinguish the general and ordinary law of the universal church both from any rules peculiar to this or that provincial church, and from those papal privilegia which were always giving rise to ecclesiastical litigation'.¹⁹ The jus commune was the law of all Christendom,

17. Thus neither a baron nor a regality court would have been described as a curia regis and we may properly distinguish other courts such as those of the justiciar and the sheriff as 'royal', albeit that 'all legitimate secular courts derived their authority from the crown': G.W.S. Barrow, 'Popular courts in early medieval Scotland: some suggested place-name evidence', Scottish Studies 25 (1981) 1 - 24 at 2.

18. See Barrow, Kingdom, 89, note 21. For 'the laws of David' see Stones, Documents, 125.

19. Pollock and Maitland, History of English Law i 176.

the law of the Holy Roman Empire, as distinct from local specialties or the jus proprium. It was in other words the general law of Christendom as opposed to the varieties of laws applicable within different parts of Christendom. It was in this sense of the general as opposed to the particular that the English lawyers appropriated the term to describe the law of their royal courts, and to distinguish it from the several rules and customs which might be applied locally in various parts of the kingdom.

The first reference to the 'common law' in Scotland is found as early as 1206 in a case where Melrose abbey sued the earl of Dunbar before papal judges delegate, seeking to recover rights of pasture. The earl argued that the ecclesiastical tribunal had no jurisdiction since he was a layman and the subject of the litigation was a lay holding. The appropriate forum for the determination of the dispute was that of common law (juris communis). Clearly here the earl was not referring to the common law of Christendom, and it is interesting to note that, although the judges delegate claimed jurisdiction through local custom, the dispute was finally resolved in the king's court.²⁰ The next reference is in 1264, in an administrative brief of Alexander III which refers to 'the usage throughout our kingdom of Scotland according to ancient approved custom and by the common law'.²¹ Here 'common law' is clearly equated with the custom of the realm, a rule applicable universally throughout the kingdom. In 1290 the Guardians of the Scottish kingdom concluded the Treaty of Birgham with the king of England.

20. Melrose Liber i 88.

21. Melrose Liber i no. 309.

The treaty provided for a marriage between Queen Margaret of Scotland and the future Edward II and a form of union between the two kingdoms. The Guardians were however careful to preserve Scottish sovereignty and one of the conditions of the treaty was that 'no letter of common law or containing special grace shall issue from the chancery unless according to the accustomed and due course of the chapel'.²² Here we see the common law linked with the briefes de cursu initiating litigations in the royal courts.

The relationship between the concepts of the kingdom and of the common law as the law of the realm can be clearly seen in these pieces of evidence, and it is therefore not surprising that fairly frequent reference to the common law of Scotland and of England can be found in the records of the Great Cause of 1291 - 92. From these records we may again observe the concept of a common law of Scotland, and gain some idea of what the phrase meant in this secular context. Thus for instance the common law is described as the law used between subjects;²³ the common law of Scotland may be different from that of England;²⁴ and finally it is argued that, since the court is the court of the king of England, it is the English common law by which the result should be finally determined.²⁵ The description of the common law as the law used between subjects is particularly interesting as a reminder of the concept of 'common pleas' in chapter 17 of the 1215 Magna Carta which gave rise in

22. Stevenson, Documents i 168 - 9.

23. Stones and Simpson, Edward I ii 167.

24. Ibid., 198, 199, 212, 214 - 15.

25. Ibid., 179, 198, 199.

time to the court of that name and which meant those pleas in which there was no specific royal interest.²⁶

The significance of royal jurisdiction and royal justice in Scotland as well as in England prior to 1300 is thus apparent. Royal justice was an aspect of kingship, part of the cement which bound the kingdom together. It seems that the provision of royal justice led to the emergence of a framework of national law, with its own courts and procedure. The evidence suggests the increasing availability of these courts and procedures, so that their use became a matter of choice for litigants rather than a special favour from the king. No longer was it the case that royal justice was for use only if the king took an interest in the dispute; it was the law used between his subjects when they litigated in his courts.

The creation of a common law in Scotland appears therefore to have been achieved well before the end of the thirteenth century and to have its roots in the exercise of royal authority. It is of course striking that this development appears to have occurred without there being any noticeable evolution along English lines of the royal courts. There is no trace in Scotland during the thirteenth century of the emergence of courts comparable to those of Common Pleas and King's Bench which were developing at that time in England. Most commentators have seen this as a failure fatal to the developments of the twelfth and thirteenth centuries, since it led ultimately to a breakdown of that system in the period after 1350. But, as we have seen in examining the evidence for the period before 1300, it was

26. Baker, Introduction, 35. For text of and comment on chapter 17, see J.C. Holt, Magna Carta (Cambridge, 1965) 223 - 4 and 322 - 3.

royal activity in the administration of justice rather than a central court which was the key to the establishment of a national or common law. If we go on to consider the evidence from the fourteenth and fifteenth centuries, it is apparent that Scottish kings were still expected to give attention to the administration of justice. The most striking example of this is found in 1399 when parliament held that 'the mys-governance of the Realme and the default of the keepyng of the common law sulde be input to the kyng and his officeris'.²⁷ The personal nature of this burden is a recurrent theme of kingship in later medieval Scotland. In 1357 upon his return from captivity in England, David II was enjoined to hold a justice ayre throughout the kingdom in person 'on account of the full justice of the king's authority which makes and strikes fear in wrongdoers'.²⁸ Nearly thirty years later, 'because the lord king for certain reasons is unable to attend personally to the execution of justice and of the laws of his kingdom', it was decided that the heir to the throne, the earl of Carrick, was 'to execute the common law everywhere in the kingdom'.²⁹ Much later, when Carrick had succeeded to the throne as Robert III, his brother the duke of Albany was appointed king's lieutenant in similar fashion.³⁰ Dr. N.A.T. Macdougall has pointed out that James III was the subject of repeated contemporary criticism 'because royal justice was not

27. APS i 572.

28. APS i 491.

29. APS i 551.

30. See SHR 35 (1956) at 141 where Professor Duncan prints this first statute of a council general of 1404.

being vigorously administered by the king in person'.³¹ One of the first commitments made by James IV on his accession to the throne in 1488 was to attend the justice ayres - a promise which, as we shall see, he seems to have kept.³² The general expectations of the king's subjects were clearly stated by parliament in 1473: he was to 'travel throw his Realme and put sic Justice and polycy in his owne realme that the brute and the fame of him mycht pas in utheris contreis'.³³

It seems therefore that there remained an association between royal authority and the administration of the common law, and this is borne out by the many other references to the common law in the fourteenth and fifteenth centuries. We find mention made of the 'kingis lawis' and the 'kingis lawis and statutis',³⁴ which by act of parliament in 1426 were contrasted with and to prevail over 'particulare lawis ... speciale privilegis ... lawis of uther cuntries and realmis'.³⁵ This is strongly reminiscent of the canonist idea of jus commune in a national context. The identity of the common law and the king's law is confirmed by a statute of 1504 ordaining that Scotland was to be 'reulit be our soverane lordis ane lawis and commone lawis of the realme and be nain other lawis'.³⁶

31. Macdougall, James III, 299.

32. APS ii 208; for the justice ayres in the reign of James IV see Mackie, James IV, 50, and below, 83 - 7.

33. APS ii 104.

34. See for example APS ii 9, c. 3; APS ii 49, c. 16, and APS ii 222, c. 21.

35. APS ii 9, c. 3.

36. APS ii 252, c. 24.

In the fifteenth century then the term 'common law' retained the implication of generality distinct from the regional particularity of certain laws and customs within the kingdom. There is much evidence for the continuing existence of local laws and customs which owed little if anything to royal authority: 'Fleminglauch' in the Garioch for example,³⁷ or the laws of Galloway and 'surdit de sergaunt'.³⁸ In Fife there were the privileges of 'Kynmaccaroun' and the 'law of Clan Macduff', both of which appear to have conferred rights to repledge men to their own courts upon, respectively, Dunfermline abbey and the earl of Fife.³⁹ Indeed it seems possible that the act of 1426 was directed in some way at the law of Clan Macduff. The earl of Fife, Murdoch Stewart, had been executed the previous

37. Aberdeen - Banff Ill. iv 156; RMS i app. 1 no. 128 and app. 2 no. 1297; Aberdeen - Banff Coll., 548.

38. For the 'laws of Galloway', see APS i 403, 537 and RMS i app. 2 no. 1012; for 'surdit de sergaunt', which appears to have been the most important aspect of the Galloway laws, Melrose Liber i no. 316; Rot. Parl. i 472 (also Memoranda de Parliaments 1305 ed. F.W. Maitland (Rolls Series, 1893) 171 - 2 and Bain, CDS ii no. 1874) and RMS i app. 1 nos. 20 and 59 (cf. RMS i no. 192 and app. 2 no. 1501, also Aberdeen - Banff Ill. iv 720 and Fraser, Carlaverock ii no. 16). 'Surdit de sergaunt' is the subject of articles by G. Neilson, '"Surdit de sergaunt": an old Galloway law', The Scottish Antiquary 11 (1897) 155 - 157, and W.C. Dickinson, 'Surdit de sergaunt', SHR 39 (1960) 170 - 175. See also G.W.S. Barrow, 'The pattern of lordship and feudal settlement in Cumbria', Journal of Medieval History 1 (1975) 117 - 138 at 129 - 30.

39. For 'Kynmaccaroun', see Dunfermline Registrum no. 456; for the 'law of Clan Macduff', APS i 551; SRO, Abercairney Muniments, GD 24/5/17, a case of 1391 summarised HMC iii 417 along with another of 1421; Balfour, Practicks ii 511 - 12 recording a case of 1548; Skene, De Verborum Significatione, s.v. 'Clan-Makduf'. See also J. Stuart, The Sculptured Stones of Scotland (2 vols, Spalding Club, 1856, 1867) ii, lxvi - lxxiii; W.F. Skene, Celtic Scotland (2nd ed., Edinburgh, 1890) iii 303 - 5; HMC viii 297 - 8; Fife Court Bk., 345 n. 5; Dunfermline Court Bk., 11 - 12; Duncan, Making of the Kingdom, 114 - 5; Nicholson, Later Middle Ages, 190. Note also the reference to the 'Grosmaakduf' in James I's 1428 charter to Cupar: Cupar Chrs. no. 3.

year; the measure may have been intended to prevent adherents still at large from pleading the law to escape royal justice.⁴⁰ If so, it marks a change in official policy. In 1384 it had been permissible to reserve the privileges of the laws of Clan Macduff and of Galloway against an otherwise general enactment concerning the arrest of fugitive criminals.⁴¹ Now all the king's subjects were to underlie the king's justice. Similarly in 1490 the custom of 'cawp taking' in Galloway and Carrick was abolished.⁴² The statute of 1504 was passed by a parliament giving 'an unwonted show of concern for the betterment of government in the Highlands and Isles' and seeking finally to subdue the stubborn independence of the Lordship of the Isles. It seems likely that, as with the statute of 1426, it represents, not vague and wistful aspirations, but the desire to suppress Celtic law and custom within the Lordship.⁴³ If this is accepted, then a more general pattern begins to emerge from the fifteenth century evidence: a tendency, not previously apparent, to establish the exclusive authority of the common law.

40. This is the persuasive suggestion of A.A.M. Duncan, 'James I 1424 - 1437' (University of Glasgow, Scottish History Department Occasional Papers 1976) 10. Both Balfour-Melville, James I, 130 and Nicholson, Later Middle Ages, 309 also link the act of 1426 with the law of Clan Macduff, each for different reasons. But note the 1548 case in Balfour's Practicks, above, note 39.

41. APS i 551; Nicholson, Later Middle Ages, 190.

42. See APS ii 214, c. 5, and APS ii 222, cc. 19 and 20. 'Cawps' were gifts to a chief made in return for his support and protection: Skene, DVS s.v. 'Cawpes'. It seems to be linked with 'Kenkynnol', for which see RMS i nos. 508 and 509 and app. 2 no. 942; Formulary E, no. 83; SRO, Ailsa Muniments, GD 25/1/29, 39, 40, 45, 52, 58, 60, 63 and 66; RMS ii no. 414; Duncan, Making of the Kingdom, 108 - 9.

43. Nicholson, Later Middle Ages, 546. See also on the 1504 act G. Donaldson, 'Problems of sovereignty and law in Orkney and Shetland', Miscellany II (Stair Soc., vol. 35, 1984) 13 - 40 at 26, pointing out that as originally drafted it was to apply to Orkney, Shetland and the Isles but was eventually confined to 'the Ilis' - i.e. the Western Isles. There is an observation to similar effect in A.L. Murray, 'Sinclair's Practicks', Lawmaking and Lawmakers in British History ed. A. Harding (Royal Historical Society, 1980) 90 - 104 at 102 note 49.

There is also evidence showing the association of common law with good government, due process and general order. Defenders would give law-burrows to do nothing 'against the common law'.⁴⁴ In 1424 parliament ordained that 'ferme and sikkir pece be keptit and haldin throu all the Realme ... under all payne that may folowe be cours of common lawe'.⁴⁵ A similar statute the following year enacted that no-one was to assist 'opyn and manifest rebellouris agayne the kyngis maieste and the commoun law'.⁴⁶ In 1490 parliament found that a 'process of forfaltour ... was nocht lauchfully led nor deducit be just and gudely ordoure according to the Commoun Law and to the use and consuetude of utheris processes of forfaltour led of before'.⁴⁷ Even the king had to bow to the common law. In 1391 Sir Thomas Erskine petitioned the king not to confirm any contract between Sir Malcolm Drummond and Sir John Swinton which might prejudice his wife's right to the earldom of Mar. To do otherwise, Erskine claimed, would be 'in hurtyng of the commoun lauch of the kynryk'. The king replied 'that it suld nocht be his wil in that case no in nane othir oucht to do or to conferme that suld ryn ony man in preiudice of thair heritage attour the commoun lauch'.⁴⁸ In 1493 James IV reached his majority and revoked a number of transactions carried out in his minority, explaining that the civil and the canon laws allowed those

44. See e.g. Moray Registrum no. 353; ADA, 18, 19 etc., passim.

45. APS ii 3, c. 2.

46. APS ii 8, c. 15.

47. APS ii 218.

48. APS i 578 - 9.



damaged by alienations of their heritage when under age to do this. Lastly he stated that he revoked all 'that the commoun law leiffs us to revoke and reduce'.⁴⁹ The common law thus appears as a check, at least in theory, upon arbitrary royal conduct, as well as a body of law distinct from the civilian and canonical codes.

(b) The Royal Courts

Against this background, some reassessment of the role of the sheriffs and justiciars in the administration of justice seems appropriate. It is perhaps worth stressing that their courts continued to be regarded as 'royal', in view of the tendency of some writers to confine royal justice to the workings of the king's council. Courts in the later middle ages continued to be made up of those who owed them suit. Thus the royal courts were made up of the king's tenants-in-chief and it is common to find references to suit of court in royal documents of our period, usually either demanding or waiving it. Thus the Regent Albany insisted in 1409 that William Crawford should continue to pay suit at the sheriff courts of Stirling and at the justice court when it was held there,⁵⁰ while in 1346 David II exempted Newbattle Abbey from rendering suit at 'our justiciary court of Lothian'.⁵¹ Kings often spoke in such proprietary tones of these courts: numerous examples may be found in the first printed volume of the register of the great seal. Nor was it only the king who so regarded them: John Crab burgess of Aberdeen

49. APS ii 236, c. 22.

50. Fraser, Elphinstone ii no. 11.

51. RRS vi no. 101; Newbattle Registrum no. 272.

falsed the doom of a baron court 'in the sheriff court of our lord king' in 1382.⁵² This serves to underline the point already made concerning the early development of royal justice, that it was exercised through a number of courts and depended chiefly, not upon 'central' courts following the king himself, but upon courts held in his name by his officers either based in or travelling through the various parts of the kingdom. By the end of the thirteenth century the administration of royal justice in this form had ceased to be remarkable, and the emphasis on the idea of the 'king's court' had lessened: nevertheless as late as 1428 there is a reference to the 'curia regis vicecomitatus de Air',⁵³ while James II could speak of 'curias nostras de camerarie et justiciarie' in 1445.⁵⁴ The administration of the common law, the king's law, was not the king's sole responsibility before 1500. As parliament had indicated when censuring Robert III in 1399, any failings in this matter were due also to the defaults of the king's officers.⁵⁵

The importance and significance of the role of these officers is confirmed, I would suggest, by a number of enactments usually taken as indicative of the ineffectiveness and inefficiency of their courts. Certainly, taken out of context, they convey an unhappy impression, but set against their general historical background they take on a different character, being contemporary with either a change

52. Aberdeen Registrum i 145.

53. RMS ii no. 108.

54. Moray Registrum no. 191.

55. APS i 572.

in government or the conclusion of some major political crisis. So for example in 1357 David II was requested to hold an ayre to check particularly that royal officers had not conducted themselves fraudulently or unfaithfully.⁵⁶ This enactment was passed by a council within one month of David's return from eleven years of captivity in England.⁵⁷ In 1404 Albany was appointed king's lieutenant to the enfeebled Robert III by a council-general, which also enacted that justiciars and sheriffs should be appointed and should not neglect to hold their courts at the due times.⁵⁸ Twenty years later, on the return of James I, again from captivity in England, parliament laid down 'that thar be maide officiaris and ministeris of lawe throu all the Realme that can and may halde the law to the kingis commonis'.⁵⁹ In 1440, following what has been described as a complete collapse of law and order after the death of the lieutenant general in the previous year, a general council signalled the return of normality by ordering the holding of justice ayres.⁶⁰ When James II reached his majority in 1450 and took up the responsibilities of government, parliament proclaimed general peace and asked the king to appoint officers capable of punishing those who infringed it. 'Juste men... that kennys the law' were to be appointed; negligent officers were to be punished; and

56. APS i 492.

57. Nicholson, Later Middle Ages, 163 - 5.

58. SHR 35 (1956) at 135, cc. 1 and 2 (translations at 136 - 7).

59. APS ii 3, c. 6.

60. APS ii 32, c. 2; Dunlop, Bishop Kennedy, 318.

justice ayres were to be held.⁶¹ Finally in 1488, following the dethronement and death of James III on the field of Stirling, it was ordained that all those who had held offices such as those of justice and sheriff under him were to be replaced by the new king's own appointments.⁶²

It is not unreasonable to see a pattern emerging when these statutes are considered together in this way. To some extent at least they appear to be proclamations of the intention of a new government to rule justly by the expectations of the time and place: that is, through the work of officers such as the justiciar and the sheriff. To say the least it is striking how such proclamations coincide with changes at the top of the power structure. Perhaps therefore these enactments are part of contemporary political rhetoric, similar in this respect to the common statements that justice would be done to rich and poor alike and that holy mother church should be protected. At the same time, the passage of such statutes enabled the new government to appoint its own officers if necessary and thus consolidate its grip upon the kingdom. It may be in other words that, rather than using these statutes to deduce that sheriffs and justiciars did not hold their courts or that they were chronically fraudulent and inept, we should see them as indicators of the importance attached to these royal officers and their customary role in the later middle ages; an importance due, amongst other things, to the fact that they were judges of the common law of Scotland.

61. APS ii 35, c. 2.

62. APS ii 207, c. 6.

(c) The Justiciary

The remainder of this chapter is concerned with the justiciary in the fourteenth and fifteenth centuries, attempting to fill what remains something of a gap in its history. Thanks to the detailed studies of Professor Dickinson we have a relatively greater knowledge of the operation of the sheriff and the burgh courts. With both, there were three sittings per annum of the head courts (curiae capitales) at which all those who owed suit in the court would be present, as well as intermediate courts held at shorter intervals with a lesser attendance of suitors. Both sheriff and burgh courts had full complements of subordinate staff - mairs or sergeants to execute summonses and judgments, clerks to keep the written record, and dempsters to pronounce the dooms.⁶³ Unfortunately in his very brief article on the history of the High Court of Justiciary for the Stair Society's Introduction to Scottish Legal History Professor Dickinson had no space to discuss such matters as the organisation, structure and personnel of the medieval justiciary. For the twelfth and thirteenth centuries the gap is now filled by the detailed study of Professor Barrow; the later medieval period remains little known, the fullest discussion still being that of Hume published in 1819.⁶⁴

In seeking to repair this deficiency our starting point must be Professor Barrow's article, in which he concluded that the justiciary was 'a principal institution within the framework of Scottish royal

63. See the introductions to Fife Court Book esp. at xiv - xviii, liv - lxix, and Aberdeen Burgh Recs., esp. at cxvii - cxxv; also his '"County" days in Scotland', Bulletin of the Institute of Historical Research 3 (1926) 161 - 167.

64. W.C. Dickinson, 'The High Court of Justiciary', Introduction to Scottish Legal History ed. G.C.H. Paton (Stair Soc. vol. 20, 1958) 408 - 412 esp., at 408 - 9; D. Hume, Commentaries on the Law of Scotland respecting Crimes (2nd ed., 2 vols., Edinburgh, 1819) ii 1 - 14.

government',⁶⁵ of that period, responsible inter alia for a wide range of judicial functions, both civil and criminal. For the purposes of the justiciarship the country was divided into regions bearing some relation to the older kingdoms which now made up the realm of Scotland. The basic division fell on the line of the river Forth, but another threefold partition was used, between the regions of Scotia, Lothian and Galloway. Probably twice in the year, in the spring and in the early autumn, the justiciars went on circuit, or on ayre, one to each region, and held courts at the caput of each of the sheriffdoms within his jurisdiction. They were not 'professional' full-time judges comparable in any way with the English justices but were 'without legal training, laymen rather than clergy, noblemen rather than of middle rank, and enjoying office by something akin to hereditary succession'.⁶⁶ Nevertheless, as Professor Barrow is able to show:⁶⁷

A study of the office as it was actually exercised in a period so formative for the historical Scottish kingdom ought at least to put us on our guard against hasty condemnations of the native secular legal machinery. It is not self-evident that the institutions at the disposal of the Scottish state for administering justice during the period from David I to John Balliol were inadequate for the purposes for which they were designed.

When we go on to examine the evidence for the justiciarship in the fourteenth and fifteenth centuries, continuity on at least three main points is apparent. First, the justiciarship continued to be divided regionally, around the line of the river Forth. Second, within each region, the justiciar continued to go on circuit or on ayre; and, in

65. Barrow, Kingdom, 136.

66. Barrow, Kingdom, 122.

67. Barrow, Kingdom, 136.

theory at least, he went twice in the year. Third, the justiciars continued to be drawn, on the whole, from the ranks of the magnates. Moreover, the holders of the office tended to be men of importance in other areas of royal government. Thus the justiciarship remained a significant office. Each of these points will now be examined in detail.

(i) The regional division of the justiciary

Professor Barrow's article brings the history of the justiciary down to 1306, the year of the coronation of Robert I. In the autumn of the previous year Edward I had introduced a new scheme for the justiciarship, with four rather than the traditional two or three zones. These were Lothian, Galloway, the country between Forth and the Mounth, and the country north of the Mounth.⁶⁸ It seems that for a time Robert I adopted this scheme, at least in part, to judge from the appearance of a justiciar 'from the waters of the Forth to the mountains of Scotia' in 1310.⁶⁹ By 1312 however we find a justiciar 'from Forth to Orkney'⁷⁰ - that is, subsuming the two northern regions of the 1305 Ordinance. References to a northern justiciar and to a justiciar of Lothian are frequent thereafter, but no mention is ever made of a justiciar of Galloway.⁷¹ It seems

68. Stones, Documents no. 33 (also APS i 119 - 122; summarised Bain, CDS ii no. 1691). See Barrow, Bruce, 190.

69. Abbotsford Misc. i 53 - 6; Lindores (Abbotsford) 11 - 13.

70. HMC v 626.

71. See Barrow, Kingdom, 106 - 7 and note 107: '... the justiciarship of Galloway .. barely outlived the thirteenth century'. Note that the designations of Gilbert lord Kennedy as justiciar of Galloway in 1459 (ER vi 574) and of Mark Haliburton as clerk of the justiciary of Galloway in 1457 (ER vi 353) are not revivals of the thirteenth century justiciary, but an aspect of the administration of crown lands. The Douglas forfeiture in 1455 had brought the lordship of Galloway into the crown patrimony (Nicholson, Later Middle Ages, 378).

therefore that under Robert I the justiciary returned to its simplest form of a twofold division between north and south.⁷²

Only at the very end of the reign of David II did the terminology describing this division become settled as 'the justiciar [either] north [or] south of Forth'. Throughout the reign of Robert I and most of that of David II the southern justiciarship was said to be 'of Lothian';⁷³ only in 1368 do we find the justiciar for that region being described as 'ex parte australi aque de Forth' (on the southern side of the water of Forth).⁷⁴ Oddly this label may have been attached some years earlier to the clerk of the southern justiciary, in 1362.⁷⁵ From 1368 the usage is substantially unvarying until the beginning of the sixteenth century. The description of the northern justiciar was much more changeable up to the 1360s and, indeed, to some extent beyond that time also. As early as 1282 there is a reference to the justiciar 'ex parte boreali aque de Forth' (on the northern side of the water of Forth),⁷⁶ but in the first half of the fourteenth century we also find the justiciar of Scotia,⁷⁷ the justiciar north

72. Cf. Barrow, Bruce, 414.

73. See the references to Robert Lauder the elder as justiciar of Lothian listed in Appendix B, below; also Melrose Liber ii no. 421; RRS vi nos. 101, 219 and 237. Raine, North Durham no. 326 gives the seal of the office of the justiciary of Lothian in 1366.

74. RRS vi no. 503.

75. RMS i no. 100 and note; cf. A.L. Murray, 'The lord clerk register', SHR 53 (1974) 124-156 at 127.

76. M.O. Anderson, Kings and Kingship in Early Scotland (Edinburgh, 1973) xvii, note 3.

77. Fraser, Menteith ii no. 29.

of the Scottish sea,⁷⁸ and the justiciar of Scotia north of Forth.⁷⁹ By and large from the 1360s the usage justiciar north of Forth was standard⁸⁰ but there were occasional departures from this: Murdoch Stewart, for instance, is designated justiciar of Scotia north of Forth as late as 1398.⁸¹ There are also references to Robert Lauder of the Bass and Edrington as justiciar of Scotia in 1425.⁸² It is just possible that the description has a different meaning here however, as by the fifteenth century, the name 'Scotia' was commonly applied to the whole kingdom and not just the regions north of Forth.⁸³ Since the usage north or south of Forth was otherwise the norm in the reign of James I, Lauder's title may suggest that he was justiciar for the whole kingdom. Not long after the accession of James II James Douglas of Balvany earl of Avandale appears as 'justiciar of the whole realm of Scots generally constituted',⁸⁴ showing that it was not

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78. Scone Liber no. 130; APS i 511; RRS vi nos. 3, 70 and 234; SHR 9 (1912) at 239; Dunfermline Registrum no. 376; Aberdeen Registrum i 86; RMS i app. 1 no. 144.
79. Aberdeen Registrum i 79 - 81; Fraser, Southesk ii no. 36.
80. Early references to 'the justiciar north of Forth' include Moray Registrum cartae originales no. 18; Dunfermline Registrum no. 376; Panmure Registrum 169; RMS i app. 1 no. 28; RMS i no. 161; RMS ii no. 3717; RRS vi nos. 33, 50, 230 and 462. In one northern document Alexander lord of the Isles is designed as justiciar 'this side (citra) Forth' (Aberdeen Registrum i 241).
81. RMS i no. 886.
82. Laing Chrs. no. 81; RMS ii no. 29.
83. Barrow, Kingdom, 364.
84. Fraser, Douglas iii no. 301.

unthinkable for the offices to be combined in one man. Thus when we see three men - Alexander Livingstone of Callendar, Gilbert lord Kennedy and David Guthrie of that ilk - each designated justiciar of Scotia later in the fifteenth century,⁸⁵ it may be that they were justiciars of the whole realm and that this explains the revival of the old-fashioned title. The hypothesis may gain support from the simple descriptions of Lauder, Kennedy and Guthrie at the relevant dates as 'the justiciar'.⁸⁶ But if the offices north and south of Forth were united in this way in the fifteenth century clearly it was exceptional and only for the briefest of intervals on each occasion. For the most part there were two justiciars whose jurisdiction was determined by the course of the river Forth.

Probably the importance to be given to these changes in the justiciars' titles is minimal. Doubtless Scotia was equivalent to the lands north of the Forth and similarly Lothian (and Galloway) to those in the south. It seems safe to conclude that these 'changes' do not signify any fundamental breach in the continuity of the justiciarship. It remained a task involving at least two people each having competence within a particular region. This was certainly regarded as the normal pattern throughout the fifteenth century. So in 1404 when a general council appointed the duke of Albany lieutenant in place of Robert III, the king ordained that there should be justiciars north and south of Forth.⁸⁷ Although it is

85. Foedera xi 238, summarised Bain, CDS iv no. 1216 (Livingstone of Callendar); RMS ii no. 812 (Kennedy); SRO, Rollo of Duncub Muniments, GD 56/11 (Guthrie).

86. RMS ii, reign of James I, witness nos. 27, 36 (Lauder); HMC iv 507 (Kennedy); TA i 66, 68 (Guthrie).

87. SHR 35 (1956) at 135 (c. 2).

sometimes suggested that James I initiated the movement to establish a central court, he seems to have made no serious attempt to alter the structure of the justiciarship, and a statute of 1436 refers to 'the kingis justices of baith the sydis of the watter of Forth'.⁸⁸ Four years later a general council ordained that 'the Justice on the south side of the scottis se and alsua on the north side of the scottis see [shall] sett thare Justice airis' as part of an effort to restore order.⁸⁹ Even when reform was in the air, the arrangements of the justiciarship seem to have been virtually immune. Thus when in 1487, James III and his parliament commenced what looks like a 'law and order' drive, their basic tool for achieving this goal was the justiciarship, but the geographical division was simply assumed: the only change in this regard was to make it possible to have two 'justices-general' in each of the regions.⁹⁰ This was made a little more specific early in 1488, when parliament listed four persons from whom the two 'gret Justicez... on the south side of Forthe' would be selected by the king, and named two others to act as justiciars in the north.⁹¹

The beginnings of change can be detected in the reign of James IV. From 1499 to 1501 George earl of Huntly and Andrew lord Gray were the justiciars, but from Huntly's death, Gray seems to have been the only holder of the office, and in 1503 he was described as 'justiciar

88. APS ii 24, c. 12.

89. APS ii 32, c. 2.

90. APS ii 176, c. 2. See also below, 114.

91. APS ii 182, cc. 5 and 6. On the significance of this 'law and order' drive, contrast Nicholson, Later Middle Ages, 523 - 4 with Macdougall, James III, 236.

general of the whole realm of Scotland'.⁹² In 1514 or 1515 Gray was succeeded by Colin earl of Argyll who was commissioned to act as justice-general both north and south of the Forth.⁹³ This looks like the last word of the old system for by 1524 the Justice was to sit continually in Edinburgh for the hearing of criminal cases.⁹⁴ The central criminal court that had thus emerged was one with jurisdiction over the whole kingdom, and although there were attempts to revive the holding of ayres and justice courts in the localities throughout the sixteenth century, these do not appear to have been successful.⁹⁵ Thus it appears that not only is the reign of James IV significant for the beginning of the development of a central court in civil causes, but it is also the period in which a similar change in the administration of criminal justice was commencing.

(ii) The Justice Ayres

This brings us on to the second point upon which continuity or conservatism may be observed in the development of the justiciarship between 1300 and 1500: that is, the system of justice ayres which according to a late thirteenth century manuscript, were to be held twice a year in the spring and in the autumn.⁹⁶ This remained the

92. APS ii 273; and see below, 116 - 7.

93. HMC iv 487.

94. APS ii 286, c. 8. But note that at the end of the sixteenth century there was still a separate seal for the justiciary south of Forth: R.K. Hannay, 'The office of the justice clerk', JR 47 (1935) 311 - 329 at 312.

95. W.C. Dickinson, 'The High Court of Justiciary', 410.

96. SHS Misc. ii 36.

theoretical position throughout the fourteenth and fifteenth centuries, as a number of parliamentary and other enactments demonstrate. The justiciars were to 'pass throu the cuntre',⁹⁷ 'twiss in the yere',⁹⁸ 'anys on the girss and anys on the Corne',⁹⁹ for this was a practice 'eftir the auld lawis', hallowed by 'auld use and custom'.¹⁰⁰ But historians have doubted whether practice did in fact follow theory in this regard. One has commented that 'the ayres tended to be few and infrequent',¹⁰¹ while Professor Dickinson noted that 'a system which works well has no need of frequent legislation, but at least seven acts enjoining the ayres to be held yearly, or generally, or diligently were passed between 1458 and 1488'.¹⁰² But as has been pointed out by Ranald Nicholson the frequency of legislation also suggests 'that against the general background of curial ineptitude the ayres stood out as being worthy of respect'.¹⁰³

I have counted eleven enactments between 1404 and 1491 which refer to the holding of ayres. Some of these have already been referred to in the discussion of statutes which were in essence, it was submitted, propaganda statements of governments which were new or which wished to proclaim the return of normality after some crisis.

97. APS ii 35, c. 2.

98. APS ii 32, c. 2.

99. APS ii 170, c. 4; APS ii 225, c. 10.

100. APS ii 32, c. 2; APS ii 35, c. 2.

101. Dickinson/Duncan, Scotland, 98.

102. Dickinson, 'The High Court of Justiciary', 408.

103. Nicholson, Later Middle Ages, 427 - 8.

This would account for statutes enjoining the holding of justice ayres in 1404, 1440, 1450 and 1488. In this interpretation therefore, justice ayres would fall to be regarded as part of the ordinary routine of royal government, or as an aspect of normality, rather than occasional events. Careful scrutiny in context of two more of these statutes, passed respectively in March 1458 and in May 1491, also suggests that they cannot be explained as reactions to a failure to hold ayres. In the first of these, parliament enacted 'that justice ayris be haldin and continewyt yerly out throu the realme for gude of the commounys'.¹⁰⁴ Nicholson states that 'it was presumably because of lapses in the holding of justice ayres',¹⁰⁵ that this statute was passed; but if this is so it is strange that in the same parliament the king was congratulated on his success in the administration of justice which had driven wrongdoers from the land.¹⁰⁶ Moreover evidence from the exchequer rolls suggests that the ayres were held regularly throughout the 1450s, and that the king himself was an active participant.¹⁰⁷ The statute cannot therefore be taken as meaning that ayres did not take place; it seems more likely to have been an endorsement of current successful practice.

A similar comment may be applied to the act of 1491, which simply ordained that 'airis be set and haldin'.¹⁰⁸ It has been

104. APS ii 49, c. 14.

105. Nicholson, Later Middle Ages, 383.

106. APS ii 52.

107. See below, 77 - 8.

108. APS ii 225, c. 10.

remarked of James IV that he drove the ayres 'as they had never been driven before'.¹⁰⁹ While the implied comment on the period before James' accession may be questioned, it is true that in his reign we have for the first time clear evidence of ayres being held regularly. The evidence is found mainly in the accounts of the treasurer where they record the king's spending as he moved round the country with the ayres. Thus the king was with the justice ayre in the autumn of 1488, the spring of 1489 and also of 1490, and in July 1491.¹¹⁰ Others may well have been held in the period, but since the king did not participate there is no trace of them in the records of his finances. But enough has survived to indicate that, whatever may have lain behind the statute of 1491, it was not 'lapses in the holding of the ayres'.

We come in consequence of this discussion to the remaining half-dozen statutes with a rather more optimistic view of the regularity of justice ayres in the fifteenth century than has been taken previously. An immediately striking feature of this group is that they were all enacted in the period 1479 - 1488: that is, in the last years of the reign of James III. James was a troubled king throughout this period and to some extent these statutes reflect his particular problems. Thus for example the principal emphasis of the act of 1479 is not so much on failure to hold ayres, more the demand that the king should himself participate.¹¹¹ As has already been

109. Dickinson/Duncan, Scotland, 252.

110. TA i 102 - 5, 130 - 1, 140, 150; ER x 243, 366.

111. APS ii 111, c. 2.

noted, James was frequently criticised for his lack of involvement with the processes of justice; but this need not imply that consequently there was no justice to be had at all. In the 1480s James also came under heavy fire from parliament for his readiness to grant remissions and respites to convicted criminals, and it is in this context that the statutes anent justice ayres are to be found. A brief glimpse of the extent to which James did in fact grant remissions is provided by the treasurer's account for 1473.¹¹² It is significant that these remissions or compositions were given following an ayre on the south-west circuit in the autumn of 1473. This suggests that ayres were a prerequisite of remissions, in the sense that generally a remission would only be necessary upon conviction.¹¹³ Such a view would seem to be borne out by the parliamentary enactments under discussion: they seek the 'scharpe executioun of justice' upon criminals, that is, they prefer punishment to mercy.¹¹⁴ It can therefore be argued that the problem which these acts show is not the lack of justice ayres, but rather one concerned with the disposal of those convicted in the ayres.

It is submitted therefore that too much has been inferred from the statutes of the fifteenth century regarding the frequency of justice ayres. Any conclusion upon this question, be it positive

112. TA i 6 - 10.

113. C.H.W. Gane, 'The effect of a royal pardon in Scots law', JR 25 (1980) 18 - 46 at 21.

114. APS ii 104, 118, 165, 170 and 176. See also APS ii 201 and Macdougall, James III, 99, 120 and 201 - 3.

or negative, based upon these statutes alone would be dangerous, as is clearly shown by the examples of 1458 and 1491. There is scope for differing interpretations as they stand; the validity of such interpretations must be tested against a deeper investigation of the sources than would appear to have been attempted hitherto. It is true of course that the material for such an investigation is not extensive, nor does it give us a direct or particularly satisfactory picture. What follows is largely based on an examination of the financial record contained in the exchequer rolls and on the completely haphazard references in charters, notarial instruments and the like, preserved in various sources. The limitations of such evidence for the purpose of determining the frequency of the justice ayres are obvious. The exchequer rolls refer to justice ayres when recorded in sheriffs' accounts; it is notorious that there are serious gaps in the sheriffs accounts.¹¹⁵ Equally a complete assessment of the 'charter' evidence would, in Professor Barrow's words, 'require the laborious and minute examination of scores and hundreds of private charters'.¹¹⁶ The present study has not aimed at that kind of completeness but rather at the assembly of sufficient material to support the conclusion that justice ayres were for the most part held on regular basis throughout the later medieval period.

115. For the lack of sheriffs' accounts see Webster, Scotland, 139. For the evidence found in the exchequer rolls see also *ibid.*, 133 - 141. For a helpful account of exchequer procedure see A.L. Murray, 'The procedure of the Scottish exchequer in the early sixteenth century', SHR 40 (1961) 89 - 117, especially at 104 - 6 for the evidence of the sheriffs' accounts on justice ayres.

116. Barrow, Kingdom, 119.

Evidence for the holding of ayres in the reign of Robert I, as distinct from the appointment of justiciars, is not very extensive. As early as May 1306 the pleas of the justiciary of Fife were being held and included a perambulation.¹¹⁷ It is likely that this ayre was held, not under the authority of Robert I, but under that of the English crown.¹¹⁸ There is no doubt that at least one of the justiciars appointed by Edward I in the Ordinance of September 1305 did carry out justice ayres. He was Sir Adam Gordon, who in 1310 and 1311 had not received his fee for the second, third and fourth years in which he was justiciar of Lothian.¹¹⁹ He had been appointed to that office in the 1305 Ordinance and this evidence perhaps suggests that he held ayres in 1307, 1308 and 1309. It is also worth noting that the murder of John Comyn at Dumfries in February 1306 took place when 'King Edward's Justices were holding their session in the castle',¹²⁰ and that it is said by one chronicler of the period that the justices' use of the penalty of outlawry during that year drove many to side with the Bruce revolt.¹²¹

117. Dunfermline Registrum no. 590.

118. The parties to the perambulation were the abbot and convent of Dunfermline and the earl of Fife, both in the English camp in 1306. (Barrow, Bruce, 179, 213).

119. Bain, CDS iii nos. 181 and 211, and p. 403. For Gordon's position as a 'leader and spokesman of the English party in Lothian' during these years, Barrow, Bruce, 270 - 1.

120. Barrow, Bruce, 206.

121. Chron. Guisborough, 378, quoted Barrow, Bruce, 245.

In 1310 a dispute between the abbot and convent of Lindores and Newburgh was resolved before the northern justiciar, undoubtedly under Scottish authority,¹²² while there is record of an assize before the justiciar north of Forth in 1320.¹²³ Perhaps more settled conditions for the holding of ayres south of Forth are indicated by the demand made by the king in 1320 that the abbot and convent of Newbattle should give suit for their lands of Masterton, Mid-lothian, at the justiciary court of Edinburgh as often as it was held there.¹²⁴ Other signs that ayres were held include the king's grants to Robert Lauder the younger and Melrose abbey of pensions from the issues of the justiciary, respectively, north of Forth and at Roxburgh,¹²⁵ as well as his exemption in 1325 of the tenants of Sir James Douglas from judgment at the hands of the king's justiciars except in cases of homicide and pleas of the crown.¹²⁶ It may safely be concluded that the justice ayres were not permanently dislocated by the turbulent political conditions of the early fourteenth century.

The first mention of ayres after the death of Robert I is a reference in the exchequer rolls for 1331 to 'the last ayre at Stirling',¹²⁷ which seems to imply that others had previously been

122. Abbotsford Misc. i 53 - 6.

123. Scone Liber no. 130.

124. RMS i no. 70; Newbattle Registrum no. 58.

125. RMS i no. 163 (confirmation by David II of pension granted to Lauder by Robert I); RMS i app. 1 no. 12 (Melrose Liber ii no. 361).

126. RMS i app. 1 no. 38; Fraser, Douglas iii no. 14.

127. ER i 396.

held at that place. But this is the last reference that I have been able to trace to ayres south of Forth until 1346, when, perhaps significantly, David II exempted the abbot and convent of Newbattle from the obligation of suit at the justiciary court of Lothian, which was owed by reason of the grant to them by Robert I of Masterton mentioned in the previous paragraph.¹²⁸ Perhaps there is more to this than the accidents of survival of evidence, for the south-east of Scotland was subject either to English domination or to various acts of devastation or both from the mid-1330s until well into the 1350s. Whether or not this actually prevented ayres being held south of Forth, it certainly had its effect on the circuit followed by the southern justiciars, as will be discussed later.¹²⁹

By contrast, in the same period there is a relative abundance of evidence for ayres north of Forth, an area which remained largely under the control of Scottish administration. An ayre was held at Elgin on 10 October 1337,¹³⁰ while in late April 1342 a full justice court was held at Inverbervie, Kincardine, by the lieutenants of the northern justiciar.¹³¹ The exchequer rolls for 1343 record the king's attendance at a justice ayre in Cupar, Fife.¹³² In July 1347 the court of the justice ayre was held at Forfar.^{132a} There is one valuable piece of evidence showing us the movements of a

128. RRS vi no. 101; Newbattle Registrum no. 272; and see above, 70 and note 124.

129. See below, 88 - 9.

130. ER i 444.

131. BL, MS. Add. 33245, ff. 156 v. - 157 r.

132. ER i 521.

132a. Arbroath Liber ii no. 22.

northern ayre in February 1348; on the 8th the court was at Forfar and by the 22nd it had moved on to Dundee.¹³³ In May the following year a court of justiciary was held 'at the standing stones of Rayne in Garioch'.¹³⁴ It is however apparent that there were also problems north of Forth in the 1350s and it has been said that after the departure of David II into English captivity in 1347 'judicial administration was in confusion'.¹³⁵ But whether entries in the exchequer rolls such as 'the sheriff produced a letter of the earl of Ross, justiciar in his sheriffdom, that he should not intromit with the profits of the justiciary court',¹³⁶ mean that ayres were not held must be a matter of doubt.

Upon the king's return to Scotland in November 1357 he was requested by council general to hold a justice ayre throughout the realm to inquire into the wrongdoings of his officers amongst others. The ayre appears to have been carried out.¹³⁷ This seems to have established the pattern for the remainder of his reign for Wyntoun's comment that the king 'ilka yere a justry/... gert hald rycht fellonely',¹³⁸ seems to be borne out by surviving record. Indeed the very first piece of evidence for this period allows us to see justice ayres operating

133. Fraser, Southesk ii no. 36.

134. Aberdeen Registrum i 79 - 81.

135. A.B. Webster, 'David II and the government of fourteenth century Scotland', TRHS 5th series, 16 (1966) 115 - 130 at 121.

136. ER i 546.

137. APS i 492; Webster, 'David II', 131 note 7 and 117 note 5.

138. Chron. Wyntoun (Laing) ii 506 - 7, cited Webster, 'David II', 117.

twice in the year. Thus William Meldrum held an ayre at Cupar for eight days from 31 January in 1358 and subsequently received his expenses.¹³⁹ Later in the year there was an ayre in the north which began at Inverness on 1 October, had reached Inverbervie by the 15th, and on 5 November was at Cupar.¹⁴⁰ It is possible that the ayre passed through Perth on this journey or on the one earlier in the year, for William Meldrum received his expenses as justiciar's lieutenant for 1358 in that burgh also.¹⁴¹ The ayre south of Forth also reappears before 1361.¹⁴² There had been ayres in Lanark and Forfar by the spring of 1359¹⁴³ and in the same year there was another at Perth.¹⁴⁴ Records show ayres at Stirling in the south and Forfar in the north in 1360.¹⁴⁵ It seems therefore that if there had been inactivity in the king's absence his return certainly prompted a change in the picture.

Such precision cannot be found in subsequent years within this period but year by year in the 1360s the exchequer rolls contain references to the issues of justice ayres, the expenses of the ayres, and the fees paid to the justiciar: for example, in 1361, 1362, 1364, 1365, 1368 and 1369.¹⁴⁶ Some of these issues could be and frequently were granted away as annual pensions to such men as John Gray, clerk

139. ER i 561, 562.

140. ER i 570, 586 - 7, 561.

141. ER i 558 - 9.

142. ER ii 82.

143. ER i 590, 583.

144. ER ii 82.

145. Fraser, Menteith ii no. 29 (Stirling); RMS i app. 1 no. 145 (Forfar).

146. Issues: ER ii 171, 176, 306; Expenses: ER ii 82, 117; Fees: ER ii 82, 176.

of the rolls, and John Lyon, the king's secretary,^{146a} while in 1365 the king commanded that the fee of the sergeant of the sheriffdom of Lanark should be paid inter alia from the issues of the justice ayres within the sheriffdom in accordance with old custom and the verdict of an assize before the sheriff of Lanark.^{146b} The implication is that the ayres were a continuing source of both income and expenditure in this period, and it would seem to follow that they were being held on at least an annual basis. Some of the gaps left by the financial records can be filled by other evidence. So in July 1366 a court of the justice ayre of Lothian was held at Melrose,¹⁴⁷ while the dooms of justice courts at Forfar, Dundee, Peebles, Dumbarton, Edinburgh and Dumfries were falsed in Parliament in 1368 and 1369.¹⁴⁸ In 1371 the earl of Ross complained to Robert II that David II had so acted as to prevent him paying suit at the court of the justiciar when it was held at Inverness.¹⁴⁹ All this taken together suggests that justice ayres, north and south, were a regular feature of the latter part of David's reign.

The first two Stewart kings, Robert II and Robert III, have not enjoyed a good reputation with historians, but despite the criticism of their failure to administer the law which can be found in the sources for the period there is also a good deal of evidence that

146a. RMS i no. 161 (Gray); RRS vi no. 431 (Lyon).

146b. RMS i no. 199.

147. Raine, North Durham no. 326.

148. APS i 504, 535 - 6.

149. Familie of Innes, 70 - 72.

justice ayres were held with regularity, particularly in the north. In the 1370s James and Alexander Lindsay regularly received fees for acting as justiciars north of Forth¹⁵⁰ while in the 1390s the same may be said of Murdoch Stewart.¹⁵¹ In 1406 the duke of Albany was allocated one hundred pounds for holding five justice ayres north of Forth.¹⁵² The exchequer rolls continue to speak of the issues and expenses of the ayres.¹⁵³ Grants from the issues south of Forth could be made to Alan Lauder the justice clerk in 1373 while in 1382 Alexander Strachan of Carmyllie, a royal scutifer, was to be paid his fee for his office of coroner in Angus and the Mearns proportionately from the issues of the justiciary of the sheriffdoms of Forfar and Kincardine.¹⁵⁴ In 1379 the right of the king's judex Andrew Dempster to an amercement from each justice ayre of Forfar was confirmed.¹⁵⁵ In 1397 there is another reference to the profits of the Forfar justiciary.¹⁵⁶ It seems therefore that the ayres remained an important source of royal income. A reference in the account of the sheriff of Lanark for 1388 mentions that two justice ayres were held within his bailiary in 1381,¹⁵⁷ although it should be noted that in the former year the sheriff of Fife could not account for any issues from the justice court because none had been held.¹⁵⁸ The

150. See ER ii 435, 437, 458, 620; ER iii 30, 652.

151. ER iii 316, 347, 376.

152. ER iii 644.

153. ER ii 394, 430, 435, 437, 438, 457, 458, 462, 620; ER iii 164, 166, 167, 241, 265, 268, 315, 643; ER iv 133, 212, 595, 634.

154. RMS i nos. 456 (Lauder) and 735 (Strachan).

155. RMS i no. 758.

156. Fraser, Douglas iii nos. 45 and 48.

157. ER iii 164.

158. ER iii 166.

financial evidence may be supplemented from the records of various cases before justiciars in the period, including ones of mortancestor, of slaughter and other crimes, and of falsing the doom of sheriff courts.¹⁵⁹ In short, there seems no doubt that justice ayres were a regular feature of life in the latter part of the fourteenth century.

The Albany governorship leaves little trace in its records of the holding of justice ayres other than references to ayres south of Forth in 1410 and at Stirling in 1414.¹⁶⁰ In 1409 Duke Robert stipulated for suit at the court of justiciary held in Stirling,¹⁶¹ while in 1420 Duke Murdoch made an agreement with Alexander Stewart earl of Mar concerning the profits of the 'justry' of Aberdeen, Banff and Inverness.¹⁶² This latter document suggests that it would be rash to draw too many conclusions from the lack of evidence for this period. If the ayres lapsed under the Albanies, then there was a revival after the return of James I in 1424. There are references to justice ayres north and south of Forth in 1425, 1433, 1434 and 1435.¹⁶³ In 1431 the king commanded the justiciar south of Forth to pay second teinds of the issues of the justiciary to the abbot and convent of Scone, showing again the significance of the ayres as a source of profit.¹⁶⁴ A glimpse of the preparations for the autumn ayre of 1435 is afforded by the letter sent by the justiciar north of

159. E.g. Fraser, Menteith ii no. 43; HMC iii 417; Morton Registrum ii no. 130; Moray Registrum nos. 164, 165 and 180; Spalding Misc. ii 319; Aberdeen - Banff Ill. iii 263.

160. ER iv 133, 212.

161. Fraser, Elphinstone ii no. 11.

162. Aberdeen - Banff Ill. iv 181.

163. Laing Chrs. no. 81; Coupar Angus Chrs. ii no. 128; Laing Chrs. no. 113; Inchcolm Chrs. no. 50. Cf. ER iv 425, 595, 634.

164. RMS ii no. 196.

Forth to the sheriff of Kinross commanding him to summon suitors to the justice court.¹⁶⁵

What happened in the period between the death of James I in 1437 and the assumption of full power by his son in 1450 is extremely obscure. We know of an ayre at Jedburgh in 1437.^{165a} The exchequer rolls at this time refer mainly to the holding of ayres within regalities which had fallen into crown hands such as Annandale and the earldoms of Strathearn and March. But in 1448 there was a dispute as to whether the bishop of Brechin owed suit of court when the justice ayre came to Inverbervie, caput of the sheriffdom of Kincardine. The case was determined by an assize in the sheriff court of Kincardine and it was held that the bishop had not been seen to give suit at the justice court, nor had he ever been amerced or punished for being absent.¹⁶⁶ This suggests that justice courts had been held with some regularity and, once again, that the argument from silence should not be pressed too hard. More concrete evidence for the holding of ayres on a regular basis can be found in the 1450s. Thus Goddo Dow and McKannane were hanged after conviction for their trespasses at the justice ayre of Stirling in the spring of 1453.¹⁶⁷ Two ayres were held at Cupar in 1454, one in January, the other in June.¹⁶⁸ In both the court heard cases of falsing the doom from

165. Pitfirrane Writs no. 24.

165a. Fraser, Douglas iii no. 301.

166. Brechin Registrum i no. 61.

167. ER vi 595.

168. ER vi 78.

the sheriff court of Fife. Ayres seem also to have been held with a fair degree of regularity at centres such as Dumfries, Kirkcudbright, Wigtown and Ayr in the south-west¹⁶⁹ and were also recorded at Edinburgh, Peebles and Jedburgh.¹⁷⁰ In the mid-1450s (we cannot be more precise as to date) James II attended an ayre in the north which progressed from Inverness through Elgin to Banff.¹⁷¹ In 1455 and 1457 there were ayres at Aberdeen.¹⁷²

The 1450s seem then to have been a period in which justice ayres were held regularly. So also the 1460s, the period of the minority of James III. There are references to ayres being held before the queen mother, Mary of Gueldres, at Edinburgh,¹⁷³ and on her behalf by Andrew lord Avandale, the chancellor, at Dumfries, between 1460 and 1464.¹⁷⁴ Avandale held an ayre as justiciar south of Forth at Ayr in March 1460.¹⁷⁵ Another ayre is recorded at Ayr in January 1466.¹⁷⁶ The 'justice ayris of Wigtoun', where three men were 'justifiit' and escheated, are referred to as recent events in October 1466.¹⁷⁷ There was an ayre at Selkirk in 1466.¹⁷⁸ In November 1469 the dooms of ayres held at Dumfries in July 1467 and October 1468 were falsed

169. ER vi 168, 177, 195, 200, 206, 209, 351, 353, 450, 546, 570, 641, 557, 201, 550.

170. ER vi 148, 97, 386, 174, 86, 143.

171. ER vi 485 - 6.

172. ER vi 158; Aberdeen - Banff Ill. iv 205 - 213.

173. ER vii 226.

174. ER vii 281.

175. Irvine Muniments i no. 13.

176. Ibid. i no. 13.

177. ADA, 4.

178. ER viii 4 - 5.

in parliament.¹⁷⁹ Thus it appears likely that there was still a fair degree of regularity in the holding of the ayres despite the various political crises of the period.

James III assumed active authority in late 1469 and, as with his father, this event seems to lead to much more frequent reference to justice ayres in the financial records. There was an ayre at Selkirk on 19 February 1470¹⁸⁰ and (assuming that the usual southern circuit was being followed) it had reached Ayr by 23 March.¹⁸¹ Inferences about this southern circuit may be made from other references in the exchequer rolls to the holding of ayres in Edinburgh,¹⁸² Lauderdale¹⁸³ and the sheriffdom of Roxburgh¹⁸⁴ before June 1470. It seems possible that this ayre was also at Stirling.¹⁸⁵ It was probably followed by a northern ayre in the summer of 1470. We know that it was at Perth in June and at Cupar on the 18th of that month.¹⁸⁶ Another ayre was held at Perth in November;¹⁸⁷ this is one of the rare instances where there is clear evidence of ayres being held in a region twice within one calendar year, in accordance with old use and custom.

179. APS ii 94.

180. ER viii 4.

181. ER viii 21.

182. ER viii 27.

183. ER viii 2, 3.

184. ER viii 7.

185. ER viii 10.

186. ER viii 12, 33 - 4, 36.

187. ER viii 36.

There is less detail for subsequent years, but still plenty of material giving glimpses of regular ayres throughout the 1470s. In 1471, for example, Robert lord Lyle, justiciar north of Forth, held an ayre at Cupar which gave a doom upon a brieve of mortancestor later falsed before the parliamentary auditors. The appeal related only to a preliminary point and the case was still continuing in 1478 when another doom given upon it before John Haldane of Gleneagles as northern justiciar was also dealt with in parliament.¹⁸⁸ Another example of the doom of a justice ayre being falsed in parliament may be found in October 1476; the doom had been given 'in the justice ayre of Edinburgh the 12 day of Julii last bipast'.¹⁸⁹ In November 1472 Master David Guthrie, justiciar south of Forth, held an ayre at Ayr.¹⁹⁰ The details of an ayre in the south-west in the late autumn of 1473 emerge clearly from the earliest surviving treasurer's accounts, in which there are listed the compositions given by those convicted at ayres in Dumfries, Kirkcudbright, Wigtown and Ayr.¹⁹¹ Quite apart from anything else, this tantalising record shows how much it was in the interests of the royal finances to hold justice ayres. The same source records the payment of £100 to Guthrie as his fee in the office of 'justry'.¹⁹² A year later a sum of money was 'gevin to ane passand

188. ADA, 12, 66.

189. APS ii 114; ADA, 57.

190. Irvine Muniments i no. 13.

191. TA i 6 - 10.

192. TA i 66, 68.

to the lorde of Erskin for the continuacioune of the Justice Are of Striveline'.¹⁹³ From a little later in the 1470s there are references to ayres at Haddington and Peebles and to 'my lord of Albanys justice aire'.¹⁹⁴ The impression of the stability and routine nature of the system is confirmed by the confident statements made by the king's council at the end of the 1470s about the next justice ayres in Cupar, Perth and Jedburgh;¹⁹⁵ there were no doubts that these ayres would be held in the near future.

The following decade is one in which parliament frequently called upon the king to hold his justice ayres, but, as already argued, it is in this period that the source from which we have derived most evidence for the holding of ayres, the exchequer rolls, suddenly ceases to assist. The ninth volume of the printed series covers the years 1480 to 1487 and contains only two references to justice ayres. The first suggests that one needs to be held, to inquire into certain deforcements in Galloway;¹⁹⁶ the other is to the ayre which was in fact held subsequently, at Kirkcudbright in 1487.¹⁹⁷ Other sources are barely more helpful. An ayre was held in the town of Ayr in 1487, perhaps following the one at Kirkcudbright; we learn of this from a chance reference in the Acta Dominorum Concilii for 1492.¹⁹⁸ An entry in the same record a few years later tells of a justice ayre

193. TA i 53.

194. ER viii 396, 480, 585; ADC i 14.

195. ADC i 26, 55, 79.

196. ER ix 380.

197. ER ix 460.

198. ADC i 233.

of Fife, also in 1487.¹⁹⁹ However there may have been a breakdown of the system earlier in the decade, perhaps as a result of the major political crisis of 1482 - 83. In March 1482 the auditors of causes and complaints ordered that an inquest be held on certain matters at the next justice ayre of Peebles. The inquest was held, but not until February 1485.²⁰⁰ This may mean that there had been no southern ayre in the intervening period or alternatively that the amount of business to be done in Peebles had not justified any ayre there until then. Certainly there was a justiciar south of Forth during at least part of those three years, for Archibald earl of Angus had been forced to resign the office in March 1483.²⁰¹ This should not be taken as an indication of a failure by Angus to discharge his duties properly. He had been one of the leaders of the opposition party who precipitated the crisis with James III at Lauder in July 1482 and there is every reason to suppose that he acquired the office in consequence of this, as for a long time prior to the crisis he had been out of favour with the king. It is, indeed, possible that he went on ayre in the autumn of 1482 since, as many have noted with some puzzlement, his name is conspicuous by its absence from the witness lists of royal charters during that time.²⁰² The dismissal of Angus came when James regained full authority. Subsequently, as previously, it is the king's men who hold the justiciarship.

This evidence shows that, whatever may or may not have been happening earlier in the decade, ayres were held in 1487. In January

199. SRO, Acta Dominorum Concilii CS 5/16, f. 6.

200. ADA, 98; Peebles Burgh Recs. no. 16.

201. APS xii 33.

202. Nicholson, Later Middle Ages, 511; Macdougall, James III, 167.

1488 ayres had been 'set' but were 'dissolvit and disertit' by order of parliament, with provision that new ones were to be 'proclamyt and set of new to be haldin on the gerss' - that is, in the spring.²⁰³ There exists one reference to a justice ayre of Selkirk in 1488 in the time of James III.²⁰⁴ Presumably this was the result of a proclamation following the January parliament, since the king was overthrown and killed in early June. It is far from easy, therefore, to assess the scanty evidence for the 1480s; what can be said is that firm conclusions that the ayres were not held have no foundation beyond the fragmentary nature of the evidence showing that they were held at least occasionally.

The reign of James IV brings about a transformation in the nature and amount of record information concerning the justice ayres which has led some commentators to infer a resurgence in the ayres themselves by comparison with what had gone before. Again caution ought to be observed before this conclusion is adopted wholesale. The record from which we can glean most information for the early years of this reign is the accounts of the treasurer which broadly are extant only from the beginning of the reign. Moreover the records of the southern justice courts themselves are in part available from 1493. Especially with regard to the former the accident of survival has surely little to do with any substantive change in the country's judicial arrangements. For example, the extent of references to justice ayres in the treasurer's accounts is entirely dependent on whether or not the king was in attendance. Nothing is

203. APS ii 182, c. 7.

204. ADC (Stair) iii 138.

said in them of the ayres at Edinburgh in July 1491 and in January 1493, of which we learn from the exchequer rolls.²⁰⁵ The treasurer's accounts do tell us of a southern ayre held from February to April in 1490²⁰⁶ but not of the northern ayre which was taking place at the same time.²⁰⁷ The point is that silence should not be accorded any particular evidential value one way or another; this applies with ever greater force as, going back in time, the evidence becomes more and more scattered.

The evidence for the reign up to 1500 is undeniably much more impressive than previously, with the ayres apparently at least annual events. The new king was on ayre at Dundee in September 1488;²⁰⁸ in November he was south of Forth at Lauder.²⁰⁹ This latter ayre also appears to have taken in Lanark.²¹⁰ From January to March 1489 he was in ayre in the south, passing through Jedburgh, Selkirk, Peebles, Dumfries, Wigtown and Ayr.²¹¹ This ayre was also at Kirkcudbright on 1 March.²¹² In the spring of the following year an ayre was at Jedburgh, Lanark and Edinburgh,²¹³ while in the north there was an ayre at Cupar.²¹⁴ In November 1490 Ormond, a messenger, was sent

205. ER x 366, 396.

206. TA i 130 - 1.

207. ER x 243.

208. TA i 140

209. TA i 89.

210. TA i 93.

211. TA i 102 - 5, 150.

212. ADC i 165. Is this the ayre at Kirkcudbright held by John lord Drummond 8 May 1489 (Prot. Bk. Young no. 210)?

213. TA i 130.

214. TA i 173.

north to 'proclaim the ayris'.²¹⁵ Sometime in that year there was a case of showing the holding in a justice ayre at Stirling.²¹⁶ There was an ayre at Edinburgh in July 1491,²¹⁷ while in October a messenger was sent to proclaim the ayre at Lanark.²¹⁸ In January 1492 another messenger was sent to Lanark to provide for a forthcoming ayre there; yet another was sent to the town of Ayr with a continuation of the ayre actually being held there.²¹⁹ In February John lord Drummond received his 'costis' in the ayres of Lanark, Selkirk, Edinburgh, Perth, Dundee, Bervie and Aberdeen, that is, both north and south of Forth.²²⁰ In May, commissions and other letters for the next northern ayre were being sent out²²¹ and in August a number of individuals were reimbursed for their costs in ayres at centres such as Lanark, Ayr, Stirling and Perth.²²² In January 1493 a justice ayre was held at Edinburgh,²²³ while at some uncertain date in that year there was also one at Aberdeen.²²⁴ It is in 1493 that fragmentary justiciary records become available, telling us of an ayre which was at Lauder from 7 to 14 and at Jedburgh from 16 to 21 November

215. TA i 173.

216. ER x 668.

217. ER x 366.

218. TA i 182.

219. TA i 184.

220. TA i 185.

221. TA i 200.

222. TA i 201.

223. ER x 396.

224. ER xi 336*, 337*.

of that year.²²⁵ In the summer of 1494 the king sent out letters to continue the ayres of the 'Northland'.²²⁶ A royal justice court was held at Edinburgh before the depute of the justiciars south of Forth on 4 August 1494.²²⁷ Another northern ayre was proclaimed and commenced at Inverness on 6 October.²²⁸ It reached Elgin on 30 October and, passing through Banff, was at Aberdeen on 10 November.²²⁹ From there a messenger was sent to the king carrying the 'extracts' of the ayre.²³⁰ A southern ayre in spring 1495 can also be partially reconstructed from the treasurer's accounts and from those of its records which have survived. It started in Edinburgh on 2 February. It reached Jedburgh on 25 February and worked there until 3 March. On the following day the ayre was at Selkirk where it remained until 7 March. The next stop was Peebles on 9 March, then Lanark on the 16th, Dumfries on the 23rd and Kirkcudbright on 6 April. The circuit ended at Ayr.²³¹ Letters had to be sent for the continuation of this 'Southland' ayre.²³² There was also a justice ayre at Ayr in July 1495, presumably the second there that year.²³³ Finally, we know that an ayre was in

225. SRO, JC 1/1, ff. 1r. - 17 v.

226. TA i 237.

227. Prot. Bk. Young no. 725.

228. TA i 212, 238.

229. TA i 213.

230. TA i 239.

231. TA i 213 - 15, 240, 255 - 6; SRO, JC 1/1, ff. 18 r. - 35 v.

232. TA i 241.

233. ER xi 350*.

the north at Inverness in 1495.²³⁴

There are numerous references to these ayres in the records of the lords of council and of the parliamentary auditors of causes and complaints.²³⁵ But there appears to be no evidence for ayres in the years 1496 and 1497, nor is the evidence for the remaining years of the century quite so detailed and interesting as it is for the period 1488 - 1495. However the records do allow us to see the complete northern circuit in an ayre held in January and February 1498. It began at Inverness and passed through Elgin, Banff, Aberdeen, Bervie, Dundee, Perth and Cupar.²³⁶ In the same year there was an ayre at Edinburgh in June²³⁷ and at Jedburgh in October.²³⁸ In November this ayre was at Peebles for six working days.²³⁹ There was an ayre at Wigtown in February 1499 which by March had reached Ayr.²⁴⁰ Two southern ayres seem to have been held in 1500: certainly one was at Jedburgh in March and another at Lanark in October.²⁴¹

This evidence from the late fifteenth century has been laid out in some detail not only to demonstrate the frequency of the ayres in

234. Family of Rose, 163.

235. ADA, 118, 130, 131, 149, 157, 174; ADC i 86, 92 - 3, 111, 125, 149, 155, 166, 202, 226, 228, 230, 233, 258, 296, 303, 306 - 7, 309, 310, 315, 316, 337, 338, 351, 363, 366, 377, 394, 410, 412.

236. TA i 318; ER xi 316*, 333*; cf. ADC ii 93 - 211 esp. at 210 - 11.

237. TA i 318.

238. ER xi 324*.

239. SRO, JC 1/1, ff. 36 r. - 47 v.

240. ER xi 340*, 349*.

241. ER xi 324*, 353*.

the period but also because it enables us to pull together the fragments which are all that we have to show the operation of the ayres for the rest of the later middle ages. Perhaps James IV did drive the ayres as they had never been driven before, but he certainly drove them along old-established tracks. In the 1260s the ayre of the justiciar of Scotia began at Inverness and passed through the sheriffdoms of Invernairn, Forres, Elgin, Banff and Aberdeen, before turning south to Kincardine, Forfar, Perth and Fife.²⁴² This is all but identical to the circuit of 1498 described in the previous paragraph. The only differences are the disappearance of Nairn and Forres, subsumed in the fourteenth and fifteenth centuries within the sheriffdoms of Inverness and Elgin respectively.²⁴³ It should also be noted that within the sheriffdom of Forfar ayres were held both at Forfar and at Dundee; while in Fife we know of one ayre held at Kinghorn in 1435,²⁴⁴ although Cupar seems to have been the usual location.

South of Forth the pattern was less settled. The thirteenth century justiciarship of Galloway was absorbed into that of Lothian, to become together the justiciarship south of Forth. In the 1260s the ayre of the justiciar of Lothian included the sheriffdoms of Berwick and Roxburgh;²⁴⁵ the courts were no doubt held in the burghs of these names. Change was made necessary when in the fourteenth century both burghs passed into English hands. A document of 1372

242. ER i 18.

243. Fife Court Bk., 361.

244. Inchcolm Chrs. no. 50.

245. ER i 9 - 10, 27.

under the name of William earl of Douglas, then justiciar south of Forth, explains that, although it had been the custom to hold a justice ayre at Berwick, that was not possible while the town remained subject to the English and so ayres had to be held at other places within the sheriffdom. It goes on to state that while it had been convenient to hold the ayre at Coldingham this was not to set a precedent for the future.²⁴⁶ Perhaps similar reasons lie behind the holding of an ayre at Melrose in Roxburghshire by the justiciar of Lothian in 1366:²⁴⁷ it is worthy of note in this connection that in 1360 Melrose abbey carefully obtained a full statement of its regalian rights from the king, stating that justiciars and other royal officers were to be firmly interdicted from any disturbance of those rights.²⁴⁸ Did this represent a precaution made necessary by the establishment of Melrose as the ayre town of the sheriffdom of Roxburgh? In the long run Lauder and Jedburgh (itself recovered from English occupation only in 1409) became the ayre towns of Berwick and Roxburgh respectively.

We must be careful here to distinguish the ayre towns from other places at which justice courts were held from time to time, as it were on an ad hoc basis: for example, on Largo Law in Fife, and at Aberchirder, Banffshire, and North Berwick, East Lothian.²⁴⁹ All these instances were cases of perambulations where the court met upon the

246. Raine, North Durham no. 147.

247. Raine, North Durham no. 326.

248. RRS vi no. 237; Melrose Liber ii no. 437.

249. Dunfermline Registrum no. 590; Moray Registrum no. 203; Laing Chrs. no. 113.

marches in question. Other places off the usual circuits at which justice courts were held include Rayne in Aberdeenshire and Fowlis in Forfarshire. Each was a case of crime, perhaps to be explained by the principle that a criminal court should be held where the wrong was committed.²⁵⁰ In general therefore departures from the circuit towns were exceptional and it seems clear that the principle stated at the end of the thirteenth century in the so-called 'Scottish King's Household', that the justiciar should hold his courts at the caput of each sheriffdom within his jurisdiction,²⁵¹ held good throughout the later middle ages.

A typical southern ayre of this period would thus have commenced at Edinburgh before proceeding first to Lauder for the ayre of the sheriffdom of Berwick and then to Jedburgh for the ayre of Roxburgh. The journey would be facilitated by the main road on the line of the Roman Dere Street which was a principal route in the medieval period.²⁵² The ayre would then move over Teviotdale, perhaps back up Dere Street as far as Melrose, before going down the Ettrick water to Selkirk for its ayre. Yet another road, possibly Roman in origin, led from Selkirk on to Peebles and probably from there to Lanark, the next two stopping places of the ayre.²⁵³ From Lanark the ayre turned south to Dumfries, once more utilising a road originally constructed by

250. Aberdeen Registrum i 79 - 81; HMC iii 417. The principle was embodied in statute in 1436: APS ii 24, c. 12.

251. SHS Misc. ii 37.

252. For the road, see the articles by G.S. Maxwell and G.W.S. Barrow in Loads and Roads in Scotland and Beyond edd. A. Fenton and G. Stell (Edinburgh, 1984) at 22 - 48 at 27 and 49 - 66 at 52 respectively.

253. Maxwell, in Loads and Roads, 27; Barrow, ibid., 53 - 4.

the Romans, which crossed over the Lowther Hills from Clydesdale into Nithsdale by way of the Daer and Potrail waters.²⁵⁴ Ayres would then be held at Kirkcudbright and Wigtown, before the final turn north for Ayr was made. Presumably from Ayr the next stop was Dumbarton and from there it would be a north-easterly journey to Stirling to conclude the ayre.

The logic of this circuit can be plainly seen upon the map and is even more apparent in the north. The starting point was Inverness from where the ayre would proceed in an easterly direction to Elgin and then Banff before moving south east to Aberdeen. Here too a well-established royal road was being followed.²⁵⁵ The route south from Aberdeen took the ayre along another familiar road, through Inverbervie, Forfar or Dundee, and on to Perth.²⁵⁶ From Perth the ayre would go south east into Fife and its final stopping place, Cupar.

Study of the ayres on the map shows one other point. It is clear that an ayre of the later medieval period visited each of the main sheriffdoms as established by the end of the reign of Alexander II. There is no record of any ayres in the sheriffdoms of Kinross, Cromarty, Argyll, Tarbert or Renfrew, all of which first appear or were erected in the second half of the thirteenth century.²⁵⁷ A most striking feature of the northern ayre in particular is therefore its eastward orientation; the regions north and west of Inverness

254. Maxwell, in Loads and Roads, 27 - 8.

255. Barrow, in Loads and Roads; 51.

256. Barrow, in Loads and Roads, 58.

257. On the development of the medieval sheriffdoms, see Fife Court Bk., 347 - 368.

appear never to have been visited by royal justice ayres. But other arrangements frequently prevailed in these areas. There were special justiciars for those parts such as Cowal and Bute which were crown lands, while in 1430 James I granted to the keeper of Kintyre and Knapdale in Argyll 'full power of holding our courts of the sheriff and the justiciar, punishing and fining trespassers in the form of the common law of our realm'.²⁵⁸ Nevertheless in 1504 parliament remarked on the lack of justice ayres, justices and sheriffs in the north and west parts of the realm whereby 'the pepill ar almaist gane wild'. Justiciars and sheriffs were to be appointed in the northern and southern isles, sitting in the former case at Inverness or Dingwall, in the latter at Tarbert (Knapdale) or at Lochkilkerran (site of a new royal castle erected in 1498, now Campbeltown, Kintyre). Parliament went on to deal with other areas that had been 'out of use to cum to our justice airis' - the lands between Badenoch and Lorne called Dochart and Glendochart, the lordship of Lorne, Mamore, Lochaber and Argyll. Dochart and Glendochart and the lordship of Lorne should pertain to the ayre of Perth, as should Argyll 'when it pleased the king'. However Mamore and Lochaber should go to the ayre of Inverness. The justice of the lordship of Argyll should sit at Perth, while the ayres of the crown lands of Bute, Arran, Knapdale, Kintyre and Cumbræ should be held at Ayr or Rothesay. That part of Cowal not in the lordship of Argyll should belong to the ayre of Dumbarton.²⁵⁹

258. Fraser, Eglinton ii no. 35.

259. APS ii 249, cc. 3 - 5. See also APS ii 251, c. 18.

We need not accept the parliament's view that the lack of justice ayres in the areas mentioned had led to lawless anarchy in order to recognise that each of them was by virtue of its geographical position and internal topography likely to be difficult to administer effectively from such centres of government as Perth and Inverness. Clearly the acts of 1504 represent an attempt to exert a greater degree of central control of the administration of justice in these relatively remote areas where previously much had depended upon the men on the spot.

The final observation to be made is that the lack of justiciary records and the statements about the holding of ayres in acts of parliament cannot be used to support an argument that the ayres were in fact held irregularly or infrequently. An examination of all the surviving evidence suggests that in some years - for example, 1358, 1381, 1454, 1470, 1492, 1493, 1495, 1498 and 1500 - two ayres were held in accordance with 'old use and custom', and that overall the justiciars followed circuits north and south of Forth with considerable regularity throughout the later medieval period.

(iii) The justiciars²⁶⁰

The third point on which the continuity of the institution of the justiciarship before and after 1300 is apparent is that of personnel. The evidence shows that the justiciars of the fourteenth and fifteenth centuries were, like their predecessors, drawn from the ranks of the magnates. Generally speaking they were also men prominent elsewhere in royal government. Thus they cannot be described as 'professional'

260. For details of references to individuals as justiciars in this section, see Appendix B. Only additional material is cited in subsequent notes.

judges in the sense that they spent their working lives acting solely in a judicial capacity. If they could be said to be of any profession it was that of 'civil servant'; moreover it is quite clear that, especially in the fifteenth century, many held office for short periods - say a year or perhaps only for one ayre - but more than once in their careers. Justiciarships appear therefore to have been delegated from time to time to members of the king's council. Although some of them held office for much longer periods, the justiciars were indeed a 'part-time, lay magistracy'.²⁶¹ But it need not follow from this that they merely masqueraded as judges. Some words of K.B. McFarlane are apposite: 'We are entitled to believe that those who appeared to function did so until the contrary is proved'.²⁶² Proof positive of legal knowledge amongst the Scottish justiciars is all but impossible and there are in general no external indicia such as, for example, university degrees in law or membership of professional groupings (for there were none) to help us. On the other hand, if we ask how these men came to be part of the king's government and why specifically they were appointed to carry out justice ayres, the answer must be that they were deemed fit for the task by the standards of the time - whatever those may have been and however different from our own or those of other countries then and now.

A list of justiciars from c.1306 (the year in which Professor Barrow's study concludes) will be found in Appendix B, together with

261. Cooper, Selected Papers, 227.

262. K.B. McFarlane, The Nobility of Later Medieval England (Oxford, 1973) 229 - 30.

the sources from which it is derived. It continues to the time when Colin Campbell third earl of Argyll was appointed justiciar general of the whole realm of Scotland north and south of Forth,²⁶³ thereby confirming what had in fact been the position since 1501, when the offices north and south of Forth were combined in the person of Andrew lord Gray. The present list is accordingly a bridge from the early medieval compilation of Professor Barrow to those found in standard works of reference which commence with Argyll's appointment and came down to whoever the current incumbent of the office of Lord Justice General may be. The bridge is a somewhat unsatisfactory construction, since there are many gaps and it is far from complete. A curious feature of the witness lists to later medieval royal charters is that they cease to designate the justiciars as such and we thus lack a source of information which is of great value for the period before 1306. Only in the reign of James IV does the designation 'our justiciar' reappear regularly in the witness lists of royal charters. This may have occurred because in his reign certain men held the office continuously over a number of years whereas this was rather unusual earlier in the fifteenth century; but such an argument cannot explain the absence of the designation in the fourteenth century charters. Whatever the reason, the result is that references to individuals as justiciars tend to be patchy and difficult to connect so as to determine such matters as the length of time for which they held office, or the precise succession of office holders. Thus for example we can be certain that Alexander, lord of the Isles and earl of Ross, was justiciar north of Forth between 1439 and 1443, but we do

263. HMC iv 487.

not know when he first came or when he ceased to hold office. He died in May 1449, and the next reference to a justiciar north of Forth after 1443 is in September 1449.²⁶⁴ It is quite likely that he held the office before 1439 but there is no evidence to prove this, nor to show that he kept it until his death.

Nevertheless the list, incomplete and provisional though it is, does substantiate the conclusions stated at the beginning of this section. If it is examined by reign - that is by considering the justiciars under each king from Robert I to James IV - it becomes clear that the office was held by royal councillors, often even by those of royal blood. It was seldom if ever held by persons out of favour with the king. In other words the justiciarships remained a very important part of the structure of royal government. Of course this does not prove that those who held office were competent lawyers and judges; but as we have seen in the earlier discussion of the ayres, the justiciarship was no light task. It involved a period usually of months, rather than days or weeks, on circuit, a heavy diet of cases civil and criminal, and was of importance in giving at least the appearance of good government and justice as well as in bringing in much needed revenue to the royal coffers. Royal self-interest, to put it no higher, dictated that the persons appointed should take their duties seriously and responsibly.

In 1305 Edward I appointed four pairs of justiciars for Scotland, each pair consisting of a Scotsman and an Englishman. The Scots were Adam Gordon (Lothian), Roger Kirkpatrick (Galloway), Robert Keith (Forth to the Mounth) and Reginald Cheyne (north of the Mounth).²⁶⁵

264. See below, 110, and Appendix B.

265. Stones, Documents, no. 33; APS i 120.

Gordon was certainly active in his office for some years while Cheyne remained a trusted agent of the English in the north.²⁶⁶ Just when Robert I began to appoint justiciars is unclear - there is a tantalising reference to David Muschet as justiciar of Fife in May 1306, as already noted²⁶⁷ - but there can be no doubt that Robert Keith's appearances in 1310 and 1312 as a justiciar north of Forth were under the authority of the Bruce since from Christmas 1308 he had been 'one of the king's indispensable commanders and administrators'.²⁶⁸ In November 1320 Thomas Randolph earl of Moray was the northern justiciar; he was perhaps the most important man in Scotland under the king until his death in 1332.²⁶⁹ Probably in the 1320s, when he appears to be a member of the king's council, William Muschet of Cargill was designed justiciar north of Forth.²⁷⁰ It is noticeable that the main territorial base of Keith, Randolph and Muschet was in the north; equally the landed interests of the southern justiciars lay south of Forth. There is a single reference to James Douglas as justiciar of Lothian before Robert Lauder the elder embarks on his long career in that office about 1319. Douglas stood alongside Randolph in the favour and esteem of king Robert²⁷¹ while Lauder was 'raised from obscurity' to a place of high importance

266. See above, 69, for Gordon; for Cheyne, Barrow, Bruce, 245 and 249.

267. See above 69, notes 117 and 118.

268. Barrow, Bruce, 399 - 400.

269. Barrow, Bruce, 399 - 400 and 446.

270. He was a signatory of the Declaration of Arbroath (1320) and present at the conclusion of the Treaty of Edinburgh (1328): Barrow, Bruce, 366 and 427.

271. Barrow, Bruce, 399.

not only as justiciar but elsewhere in royal government.²⁷² Muschet apart, all these individuals belonged to 'a small group of specially trusted, specially favoured men, who though not personally related to the king were obviously his intimate counsellors, prominent in every department of the royal service, military, diplomatic and judicial'.²⁷³

After king Robert's death in 1329 and the accession of the infant David II, we find Reginald Cheyne, son of the Edwardian justiciar, as 'justiciario' at Elgin in 1330²⁷⁴ and a passage in Wyntoun describing 'a justre..held at Invernys' by the guardian Randolph in 1331.

Wyntoun also refers to Randolph holding a 'justry' at Wigtown in Galloway that year.²⁷⁵ Presumably however this was not as justiciar of Lothian, for Sir Robert Lauder continued to exercise this office until at least 1333. It is recorded that he was present at the battle of Halidon Hill in July of that year but that he was too old to take an active part.²⁷⁶ Nevertheless as one of the auditors of

272. Barrow, Bruce, 400.

273. Barrow, Bruce, 399. It should be noted here that the appearance of John son of Adam Bruning as a justiciar specially deputed ad hoc in 1320 (RMS i app. 1 no. 67) was not as a 'subordinate justiciar' (Barrow, Bruce, 441) but rather an early example of the special commission of justiciary, for which see Dickinson, 'Administration of justice', 346. Another example in the reign of Robert I is RMS i app. 1 no. 74 (APS i 479).

274. It is possible that Cheyne was acting here as justiciar, not of the king, but of the regality of Moray: A.Y. Cheyne, The Cheyne Family in Scotland (Eastbourne, 1931) 40.

275. Chron. Wyntoun (Laing), lines 3188 - 9, 3210.

276. Notes on Historical References to the Scottish Family of Lauder compiled by J. Young under the direction of A. Lauder (2nd ed., Paisley, 1886) 34; C.A.B. Lawder, The Lawders of the Bass and their Descendents (Belfast, 1914) 15.

the exchequer in 1337 Lauder was designed justiciar of Lothian once again. But it is uncertain how meaningful the title was at that time. In 1334 the sheriffdoms of Berwick, Roxburgh, Selkirk, Peebles, Edinburgh and Dumfries, the constabularies of Linlithgow and Haddington and the forests of Ettrick and Jedburgh - that is, most of the territory over which the justiciar of Lothian had jurisdiction - was ceded to the English crown and made subject to English administration.²⁷⁷ This led to the appointment by Edward III of Sir Robert Lauder the younger, son of the already mentioned Sir Robert, as 'justitiarius regis Anglie in Laudonia' in June 1334.²⁷⁸ But 'if even a vestigial English administration...set to work in the ceded counties it was almost immediately displaced'.²⁷⁹ A Scottish rising of gathering strength led to the renewal of hostilities, in Lothian and elsewhere, which lasted until 1338;²⁸⁰ the evidence suggests that this was a period of considerable dislocation and difficulty in the government of Scotland.²⁸¹ In 1338 there was still an English justiciar of Lothian, Richard Talbot the warden of Berwick;²⁸² it is his existence which casts doubt on the effectiveness of the elder Lauder's position as the Scottish justiciar

277. Nicholson, Edward III, 160 - 4.

278. Rot. Scot. i 271; Nicholson, Edward III, 162.

279. Nicholson, Edward III; 167.

280. Nicholson, Edward III, 164 ff.; Nicholson, Later Middle Ages, 130 - 8.

281. Nicholson, Edward III, 227 - 8; Nicholson, Later Middle Ages, 140.

282. Bain, CDS iii no. 1288.

of Lothian during these years.

The record of a dispute in the exchequer in the late 1330s shows the sheriff of Aberdeen, William Meldrum, as a justiciar, almost certainly north of Forth, in 1335, while Adam Buttergask was the current holder of the office. In the accounts of December 1337 it was noted that Buttergask had held an ayre at Elgin. He appears to have been a significant figure at this period, holding offices such as clerk of the wardrobe and chamberlain depute. In origin a Perthshire man, his landholdings were all in the north, in particular Banffshire.²⁸³ There also exist references to Robert Lauder the younger as justiciar of Scotia north of Forth in March 1336 and February 1337. He had re-established himself on the Scottish side by 1335 when his tenements in the burgh of Berwick were declared forfeit by Edward III.²⁸⁴ In the document of March 1336 where he is styled justiciar of Scotia he is also designed lieutenant of the guardian of Scotland (almost certainly by then Andrew Murray),²⁸⁵ while in the document of February 1337 he appears at Falkland alongside such other leaders of the Scottish party as the guardian Murray and William Douglas, who were then conducting a campaign in Fife.²⁸⁶ Despite his obvious political stature at this time there is no sign that Lauder played any major role thereafter, judicial or otherwise, although he survived until the

283. For Meldrum see ER i 542, 545; for Buttergask, ER i cl - cli.

284. Bain, CDS iii nos. 1192, 1193.

285. Arbroath Liber i no. 290; Nicholson, Later Middle Ages, 133.

286. Spalding Misc. v 243 - 4 (summarised Fraser, Douglas iii no. 315); Nicholson, Later Middle Ages, 135.

1360s.²⁸⁷ In 1363 a pension of twenty pounds per annum granted to him by Robert I and to be uplifted from the profits of the justiciary north of Forth was confirmed by David II,²⁸⁸ but this seems to be his only recorded link with the justiciary after 1337.

Despite the re-establishment of 'normal' government we lack evidence for the justiciars of Lothian in the 1340s and, indeed, for most of the 1350s. But for the king's exemption of Newbattle abbey from suit at the court of the justiciary of Lothian in 1346²⁸⁹ it would be tempting to suppose that the dislocation of the 1330s and the continuing incursions of the English into south-eastern Scotland had had long-term effects south of Forth.²⁹⁰ However in the north the picture is different. The evidence for regular ayres there has already been discussed and this may be attributable to the hold upon the office north of Forth by one man throughout the period. By 1339 William fifth earl of Ross had acquired the northern justiciarship, which he held into the 1350s and perhaps as late as 1358. This was despite a challenge in 1344 to his right to hold it, made by Sir John Randolph, nephew and heir of Thomas Randolph. John abandoned his claim in parliament when he confessed 'that he had no right to the office of justiciar north of the Scottish sea

287. Scottish Family of Lauder, 38; Lawder, Lawders of the Bass, 19.

288. RMS i no. 163; cf. RMS i app. 2 no. 1479.

289. RRS vi no. 101; Newbattle Registrum no. 272.

290. On these incursions see Nicholson, Later Middle Ages, 147 - 50, 161 - 2; G.W.S. Barrow, 'The aftermath of war - Scotland and England in the late thirteenth and early fourteenth centuries', TRHS 5th series, 28 (1978) 103 - 125, esp. at 122 - 5.

by way of heritage'.²⁹¹ Ross was a cousin of David II, his mother having been a sister of Robert I, and he was one of the greatest of northern landowners at this time. Whenever David was in the north Ross was prominent among his counsellors.²⁹² He may have been succeeded by the same William Meldrum who had been in office in 1335, as he is said in the exchequer rolls to have been justiciar at Cupar (north of Forth) on 25 January 1358. But in the same year Meldrum was also designated lieutenant to the (un-named - perhaps Ross?) justiciar,²⁹³ so that it is not quite clear whether or not the other exchequer entry is reliable in giving him promotion to the higher position.

On the return of David II from his English captivity in 1357 the justiciarships again became the subject of royal patronage. Robert Erskine first appears as justiciar north of Forth in 1359 and in 1360 he held the office jointly with Hugh Eglinton. Both these men seem likely to have risen to prominence through the entourage of the Steward, from whose territories they came.²⁹⁴

291. J.M. Thomson, 'A roll of the Scottish parliament 1344', SHR 9 (1912) 235 - 240 at 239.

292. Webster, 'David II', 125; RRS vi 9.

293. ER i 558 - 9; 'see also ER i 546'.

294. Erskine, Renfrewshire, is on the Clyde, by Paisley, and was held of the Stewarts from at latest the mid-thirteenth century: Barrow, Kingdom, 345. (see also RRS vi no. 119). Eglinton, north of Irvine, Ayrshire, was in Cunningham, granted to Robert Stewart by Robert I 1316 x 1320: RMS i no. 54. Hugh Eglinton married Robert Stewart's half-sister Egidia. A calendar of documents relating to Hugh Eglinton may be found in G. Neilson, 'Sir Hew of Eglinton and Huchown of the Awle Ryale: a biographical calendar and literary estimate', Proceedings of the Royal Philosophical Society of Glasgow 32 (1900 - 1) 111 - 150, at 114 - 131. In many of these documents he is connected with Robert Stewart and his family and with Robert Erskine.

Certainly Erskine had become chamberlain during the lieutenancy of the Steward between 1347 and 1357.²⁹⁵ But his career under David II was one of startling success and he could be described by the king as 'confederato nostro'.²⁹⁶ He already held extensive northern lands in 1357,²⁹⁷ so his appointment as justiciar north of Forth was consistent with the policy of linking the office with a local base. The doom of a justice court held by Erskine at Dundee, north of Forth, was falsed by parliament in June 1368, so it is possible that he retained the office from 1359 until this time. But by 1370, William Dishington, another of the king's closest councillors and a Fife landowner, had succeeded him.²⁹⁸

In the south, William Douglas held a justice ayre at Edinburgh in 1358 and was presumably justiciar of Lothian at that time. In the same year the king made him first earl of Douglas, but in 1363 he was involved in a rebellion with the Steward and the earl of March.²⁹⁹ This may have played some part in the transfer of the office to the faithful Erskine, who is found as justiciar of Lothian in 1366 and may therefore have been sole justiciar at this period. But when the Steward ascended the throne as Robert II in 1371, Douglas again became justiciar south of Forth. Royal favour and

295. Nicholson, Later Middle Ages, 150.

296. See RMS i no. 839; for his career, Webster, 'David II', 127; Nicholson, Later Middle Ages, 169; RRS vi 9.

297. See e.g. RRS vi no. 198 (the lordship of Garioch).

298. See RRS vi 9. For his lands of Ardross and Kinbrackmont in Fife see RMS i nos. 293 and 327, RRS vi no. 361.

299. Webster, 'David II', 127 - 9; Nicholson, Later Middle Ages, 168 - 9.

extensive southern landholdings were obviously important in this reappointment. Indeed it is just possible that the southern justiciarship remained in the Douglas family from that time until at least the early years of the fifteenth century. If so, this closely parallels the position north of Forth, the justiciarship of which was more or less a preserve of the Stewarts or their close relations until 1424. But the evidence for a Douglas hold on the southern justiciarship is very limited. Archibald Douglas ('the Grim') who became the third earl in 1388, held an ayre at Dumfries in 1383, but the document recording this fact does not state whether or not it was a justice ayre.³⁰⁰ Even before he achieved the earldom Archibald was a prominent figure in royal government, keeper of Edinburgh castle under David II and a regular name in witness lists to charters of David and the first two Stewart kings;³⁰¹ exactly the type of man who might well have been appointed justiciar. In 1410 the fourth earl of Douglas, Archibald 'the Tyneman', held a justice ayre 'ex parte australi aque de Forth'; this appointment at least must reflect the position of the Douglasses as 'unquestionably the most powerful magnates south of Forth'.³⁰²

300. Melrose Liber ii no. 485; cf. Fraser, Douglas i 337. The ayre was not that of the chamberlain, for that office was held by Robert Stewart earl of Fife and Menteith from November 1382 until March 1407: British Chronology, 179.

301. Fraser, Douglas i 321 - 352 narrates his career; see also Webster, 'David II', 127; Nicholson, Later Middle Ages, 169.

302. Nicholson, Later Middle Ages, 203. There is some evidence that the Douglasses did not enjoy a complete monopoly of the southern justiciarship in that David Stewart earl of Carrick and eldest son of Robert III apparently held a justice ayre at Lanark in 1392 (ER iii 311). But it seems unlikely that he was then a fully-fledged justiciar, since in 1392 he was only fourteen years of age: A. Grant, 'The higher nobility in Scotland and their estates c. 1371 - 1424', (Oxford University D. Phil., 1975) 109 n. 1.

We know far more about the northern than the southern justiciars in the latter part of the fourteenth century. They seem by and large to have been close relations, either by blood or by marriage, of the new Stewart kings. Thus James Lindsay of Crawford, who held office in the early 1370s, was a nephew of Robert II, his mother having been the king's sister, Egidia.³⁰³ He was succeeded by his uncle, Alexander Lindsay of Glenesk, whose second wife, Marjory Stewart, was a niece of Robert II.³⁰⁴ Alexander remained justiciar north of Forth until at least 1380; the next known holder of the office, Alexander Stewart earl of Buchan, was one of the king's younger sons and is first referred to as justiciar in February 1387. In December 1388 Buchan was accused of negligence in the administration of his position before the king's council and was accordingly relieved of his duties.³⁰⁵ He was replaced first by David Lindsay of Glenesk, son of the above mentioned Alexander Lindsay and a prominent courtier who was to become the first earl of Crawford in 1398. His wife was a daughter of Robert II and accordingly the king would occasionally style him as 'filius'.³⁰⁶ His justiciarship was however short; in April 1389, perhaps after he had held the spring ayre, Murdoch Stewart, son and heir of the earl of Fife and a grand-nephew of Robert II, was appointed to hold office for one year.³⁰⁷

303. Scots Peerage iii 11 - 13.

304. Scots Peerage iii 14.

305. APS i 556.

306. Scots Peerage iii 13 - 16 and see RMS i nos. 761 - 4.
Robert III styled him 'frater': RMS i nos. 801, 811, 812.

307. APS i 557.

These events of 1388 - 89 are of considerable interest in the light they throw on contemporary perceptions of the justiciarship and its political importance. The council general of December 1388 which dismissed Buchan also stripped the king's eldest son, John earl of Carrick, of his guardianship of the realm and conferred it upon the earl of Fife.³⁰⁸ Within a few months Fife ensured the passage of the office of justiciar north of Forth to his own heir. In December council had laid down that the new justiciar should be a person who was 'sufficiens'. This was expanded upon at the time of Murdoch Stewart's appointment, when it was agreed that ayres north of Forth could not easily (comode) be held at that time 'without sufficient power' (sine sufficienti potencia) and in consequence Murdoch's father was enjoined to support him with 'sufficient power and council'.³⁰⁹ In other words, while 'regard for provincial differences and entrenched feudal power',³¹⁰ continued to be important in the appointment of justiciars, the political power and support of central government was deemed essential to their success.

Murdoch Stewart appears to have held two ayres during his year of office, for he can be found acting as justiciar north of Forth in January and November 1390. In December 1391 however Walter Stewart lord of Brechin was the king's justiciar. He was a half-brother of the new king Robert III and his guardian, Robert Stewart the earl of Fife, and played a prominent role in the royal council

308. APS i 556; Nicholson, Later Middle Ages, 199 - 201.

309. APS i 556. - 7.

310. Barrow, Kingdom, 136.

throughout the 1390s.³¹¹ But from 1392 on, Murdoch appears to have had a firm grip on the northern justiciarship, as well as a high place in the king's councils, until captured by the English at the battle of Homildon Hill in 1402. He was to remain a prisoner south of the border until March 1416.³¹² It seems that his duties were taken over by his father, now the duke of Albany, who in 1406 received one hundred pounds 'for the office of justiciar, having held five ayres by the time of the account north of the water of Forth'. If ayres were held on an annual basis, this entry in the exchequer rolls would fit quite neatly into the period from the capture of Murdoch.

Robert III died in April 1406. His heir, James I, was a captive in England and for almost the next twenty years supreme power in Scotland rested first in the hands of Albany and then from 1420 in those of his son Murdoch.³¹³ During this period of the Albany governorship, there is very little evidence about justiciars and justice ayres. The reference to the earl of Douglas as justiciar south of Forth in 1410 has already been mentioned, and there is also mention in the exchequer rolls of Albany holding an ayre at Stirling (south of Forth) in 1414. Matters became a little clearer with the return of James I to Scotland in 1424. Robert Lauder of the Bass and Edrington, direct descendant in the male line of the Robert

311. Nicholson, Later Middle Ages, 211, 216, 232; see also below, 109.

312. Balfour-Melville, James I, 22, 25 - 6, 65.

313. On the Albany governorship see Nicholson, Later Middle Ages, 229 - 60.

Lauders who had been justiciars a century earlier,³¹⁴ appears regularly in the witness lists of royal charters from 1425 to December 1426 as 'justiciar', and from then through 1427 as 'justiciar south of Forth'. In the earlier period he can be found designed as the justiciar of Scotia; possibly an indication that he was then sole justiciar, as already discussed. In 1427 and 1428 Patrick Ogilvy appears in the witness-lists with equal regularity as justiciar north of Forth. Both Lauder and Ogilvy were also sheriffs, respectively of Lothian and Angus. The former played a part in the negotiations for the release of the king from his English captivity,³¹⁵ while Ogilvy died in the royal service as an ambassador to France.³¹⁶ As well as having appropriate local connections therefore, both men were active in general government work. This was probably also true of Thomas Somerville, the only other justiciar south of Forth of whom evidence has been discovered in the reign of James I.³¹⁷ He was a considerable landowner whose son was to become a lord of parliament in the next reign and who himself was using a peerage style, the lord of Somerville, as early as 1430.³¹⁸ He may have held his office from 1428 to 1436, in succession to Lauder. We know of two northern justiciars at the end of the reign of James I. Walter Stewart, the earl of Atholl,

314. The most thorough account of the Lauder descent is Lawder, Lawders of the Bass, 19 - 23.

315. Balfour-Melville, James I, 93, 96.

316. Balfour-Melville, James I, 162 - 3.

317. For his career see Scots Peerage viii 7 - 9.

318. See A. Grant, 'The development of the Scottish peerage', SHR 57 (1978) 1 - 27 at 12 - 17.

Strathearn and Caithness appears in the office in July 1433 and October 1435. An uncle of the king who was to play a leading part in his assassination in 1437, Walter's earldoms gave him much power and status in the north of Scotland and he had been active politically at the centre of government since the reign of his half-brother Robert III. This, it will be recalled, had included the office of justiciar as early as 1391 when his only title was lord of Brechin.³¹⁹ Alexander Stewart earl of Mar held an ayre at Inverness as justiciar, presumably north of Forth, in 1435, as well as one at Aberdeen at some other unspecified date. The illegitimate son of the earl of Buchan who had been dismissed as justiciar in 1388, Alexander had acquired his title jure uxoris and, having led the successful army in the battle of Harlaw (1411) on behalf of the government, he became one of the most important men in the north of Scotland and an active supporter of the king.³²⁰

The death of James I led to the prolonged minority of James II. In November 1437 we find James Douglas of Balvany, earl of Avandale as 'justiciar of the whole realm of Scots generally constituted', but by 1441 when he had become the seventh earl of Douglas his office was confined to the regions south of Forth. He probably retained the office until his death in 1443. Douglas has perhaps been maligned too much at the hands of historians as a result of the

319. See above, 106; Balfour-Melville, James I, 246 - 8; Nicholson, Later Middle Ages, 322 - 3.

320. Balfour-Melville, James I, 21, 37, 46, 84, 195; Nicholson, Later Middle Ages, 319.

way in which he acquired his earldom through the 'Black Dinner' and the soubriquet, 'the Gross', attached to him by the sixteenth century chronicler, Pitscottie. The records suggest a long career in government: as early as 1405 he was warden of the march and later he was one of the ambassadors who treated for the release of James I from his English captivity.³²¹ Thereafter he appears to have been a loyal servant of the king, if we may judge from his quite frequent position as a witness to the great seal charters.³²² Douglas was very prominent in the government of the early years of the royal minority apart from his work as justiciar; the same is true of his contemporary as justiciar north of Forth, Alexander lord of the Isles earl of Ross, and also of the man who apparently succeeded Douglas in the south, Alexander Livingstone of Callendar.³²³ Douglas died in 1443 and in 1444 we find Livingstone holding an ayre at Dumbarton. He also appears as justiciar of 'Scotia' in September 1449, a few months after the death of the lord of the Isles; it is possible therefore that he had then become justiciar of the entire kingdom. By this time Livingstone had risen to a supreme position within the government, so his occupation of the office of justiciar demonstrates its continuing political importance.³²⁴

321. Balfour-Melville, James I, 93, 95, 122, 130 and 192; Nicholson, Later Middle Ages, 225.

322. RMS ii, reign of James I, witness nos. 6, 13 and 25.

323. Dunlop, Bishop Kennedy, 29 - 46; Nicholson, Later Middle Ages, 327, 330 - 2, 355 - 6. For Alexander lord of the Isles as a justiciar see also J. Munro, 'The Lordship of the Isles', in The Middle Ages in the Highlands ed: L. Maclean of Dochgarroch (Inverness Field Club, 1981) 23 - 37 at 28 - 9.

324. Nicholson, Later Middle Ages, 328, 349.

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For the years between 1450 and 1460 it is difficult to find anything other than the briefest of references to individuals as justiciars, but those who are mentioned appear generally to have been men associated with the king's government. Sir George Crichton, justiciar at Ayr according to an entry in the exchequer rolls, was also admiral of Scotland.³²⁵ William Sinclair earl of Orkney and chancellor of Scotland from 1454 to 1456 is said in the Ordo Justiciarie to have been justiciar south of Forth and references in the exchequer rolls do suggest that he attended ayres in both north and south during his chancellorship.³²⁶ William lord Somerville, a lord of parliament, is also mentioned in the same source as a justiciar in the early 1450s. Laurence lord Abernethy of Rothiemay, another lord of parliament, was justiciar south of Forth in March 1455. Andrew Stewart lord Avandale, illegitimate son of the eldest son of Murdoch Stewart duke of Albany (a justiciar in the 1390s), held ayres at Kirkcudbright and Wigtown in either 1457 or 1458. His career under James II has rightly been described as 'impressive' by Dr. Macdougall: having participated in the assassination of the earl of Douglas in 1452, he rose through the household, receiving a knighthood, the barony of Avandale and a lordship of parliament before becoming warden of the west march in 1459 and chancellor in 1460, just before the king's death.³²⁷

325. Dunlop, Bishop Kennedy, 57.

326. For the Ordo see APS i 705 and below, 185 and note 33.

327. Macdougall, James III, 22; Chalmers, 'King's council', 246 - 7. For Avandale's descent see RMS ii no. 1425 and Highland Papers iv 203 - 6.

Similarly John lord Lindsay of Byres, justiciar north of Forth in October and November 1457 although the lands from which he took his title were in East Lothian, was a lord of parliament by May 1452.³²⁸

Despite the death of James II, Avandale and Lindsay of Byres continued to hold office as justiciars during the minority of James III. The latter was justiciar north of Forth in June 1466 although Gilbert lord Kennedy's designation as 'justiciarius Scotie' which was discussed earlier, comes in 1464. Avandale, who was to remain chancellor until 1482, held an ayre at Dumfries between 1460 and 1464 and at Ayr in 1460. However there were changes in practice south of Forth at this period, for quite frequently two justiciars were appointed to hold ayres there jointly.³²⁹ In February 1461 Colin Campbell first earl of Argyll and Master of the Royal Household³³⁰ and Robert lord Boyd, best known at that time as a lord of parliament and long-standing servant of the crown,³³¹ held court together as 'justices' south of Forth. In January 1465, two lords of parliament, William lord Abernethy of Rothiemay and William lord Borthwick, held an ayre together at Jedburgh as 'justices on southhalffe Forthe', while in October 1465, John lord Houston and Sir William Semple were the justiciars south of Forth at Dumbarton. In January 1466 William

328. Grant, 'Scottish peerage', 13. Byres is now a farm in East Lothian (OS, NT 495769). Lindsay was also a great nephew of Alexander Lindsay of Glenesk and a first cousin once removed of James Lindsay of Crawford and David Lindsay of Glenesk, all justiciars under Robert II: Scots Peerage v 391 - 3 and above, 105.

329. There were precedents: e.g. the joint appointments of Robert Erskine and Hugh Eglinton as justiciars of Scotia in 1360 (Fraser, Menteith ii no. 29; RRS vi no. 228). For examples before 1300 see Barrow, Kingdom, 129.

330. See Macdougall, James III, 66, 80; Chalmers, 'King's council', 247 - 8.

331. Macdougall, James III, 70.

Edmonstone of Duntreath and Gilbert Kennedy of Bargany, a cousin of Gilbert lord Kennedy,³³² held court together at Ayr as justiciars south of Forth 'generally constituted'. For a while such arrangements were then abandoned: in January 1467 Edmonstone of Duntreath was the solitary justiciar south of Forth and in October 1468 Robert first lord Lyle was the only justiciar in an ayre at Dumfries. But in March 1471 Edmonstone was acting jointly with David Guthrie of that ilk. Perhaps Guthrie was serving a form of apprenticeship, for by November 1472 he was the sole justiciar south of Forth generally constituted at Ayr, albeit with as powerful a figure as the earl of Argyll as his depute. There is a possible reference to Thomas lord Erskine acting as justiciar south of Forth (at Stirling) in 1474³³³ and mention has already been made of the termination of the appointment of Archibald earl of Angus in 1483. The next clear reference to justiciars acting south of Forth, in 1485, once again shows two men acting jointly, Andrew lord Avandale and Robert second lord Lyle.^{333a}

North of Forth, by contrast, there is no evidence for the appointment of joint justiciars. Robert second lord Lyle held an ayre singly at Cupar in 1471 while David Guthrie was justiciar 'of Scotia' in 1473. In 1478 John Haldane of Gleneagles held

332. The Kennedies of Bargany descended from a younger brother of the father of Gilbert lord Kennedy: D. Cowan, Historical Account of the Noble Family of Kennedy (Edinburgh, 1849) 16 - 21. Note that Edmonstone and Kennedy were 'generally constituted': in April 1466 Houston and Semple were 'specially constituted' justiciars south of Forth to continue dealing with an action between Gilbert lord Kennedy and Robert lord Fleming begun the previous year: SRO, Ailsa Muniments GD 25/1/102.

333. TA i 53.

333a. The second Lord Lyle succeeded his father c. 1469: Scots Peerage v 553.

another Cupar ayre. George earl of Huntly was appointed justiciar north of Forth in October 1479 and was apparently still in office in 1482. The ayre of Fife in 1487 was however held by David earl of Crawford. It looks as though the rather wavering practice south of Forth did not affect the northern office.

It is therefore in a new light that we may look at an act of parliament passed in October 1487 stating that one or two justice generals were to be made south and also north of Forth.³³⁴ It appears to place matters in the south on a statutory footing and to consider desirable the extension of practice there to the north. This was consolidated by further acts in January 1488 which effectively commanded that there be double appointments on both circuits.³³⁵ David earl of Crawford and George earl of Huntly, both past holders of the office, were to be justiciars north of Forth. Two names were to be selected from a list of four for the southern offices. Only one of these, Robert lord Lyle, had previously been a justiciar. But two of the others, John lord Glamis and John lord Drummond, were to have long careers as justiciars under James IV. The last of the four, John Ramsay lord Bothwell, was designed as a royal justiciar along with Robert lord Lyle immediately after the passage of the 1488 act, but, having been a favourite of James III, did not obtain similar heights in the next reign.³³⁶

334. APS ii 176, c. 2.

335. APS ii 182, cc. 5 and 6.

336. Macdougall, James III, 193; Chalmers, 'King's council', 293 - 5.

The justiciars of James III conform in general to the pattern of being government men, counsellors and supporters of the kings. This is clearly the case with people such as Avandale, Argyll, Crawford, Huntly, Lyle and Guthrie, and is probably also true of Edmonstone and Haldane.³³⁷ Guthrie's is a particularly interesting case, for he had 'a long and successful administrative career', holding numerous important offices, including that of clerk register, between 1461 and 1474. It has been said that he was 'a rare creature for his age, a graduate laird, who had studied at Cologne and Paris'; he was probably the only layman to hold the office of clerk register before 1532. He appears to have been the first justiciar with a university degree, albeit that of M.A., and was an active court pleader.³³⁸

The same general conclusion can be drawn about the justiciars of the next reign. Moreover, because the men who held office were so often designated as justiciar in the witness lists of royal charters under the great seal, it is possible to state the periods of time for which they did so. In the period 1488 to 1495 this suggests that normally there were only two justiciars, but this may be misleading. There is also no indication of a geographical division of work. Throughout that period John lord Glamis acted as one of the justiciars. His first colleagues were Robert lord

337. See Macdougall, James III, passim; also Chalmers, 'King's council', 172 (Lyle), 174 - 5 (Crawford), 246 - 7 (Avandale). Haldane attended parliaments (APS ii 116, 132, 169); Edmonstone was elected to the parliamentary committee ad causas in 1478 (APS ii 116). The account of the latter's public career in A. Edmonstone, Genealogical Account of the Family of Edmonstone of Duntreath (Edinburgh, 1875) needs some correction.

338. Murray, 'The lord clerk register', 133; Macdougall, James III, 100; for appearances as a pleader in court see Appendices D and H.

Lyle and John lord Drummond but in early 1489 Lyle was involved in a rebellion³³⁹ and was dismissed. Drummond held office until 1491 when Lyle, restored to favour,³⁴⁰ was given back his former position, which he retained until 1495. The earliest surviving justiciary records however show Lyle holding court jointly with Laurence lord Oliphant as justiciars south of Forth at Lauder and Jedburgh in November 1493.³⁴¹ But in February and March 1495 these records describe Lyle and Glamis as justiciars south of Forth. This may have been the close of their careers in the offices. Their depute John lord Drummond seems to have been the man who actually held the ayre.³⁴² From 1494 Drummond was constantly designated justiciar in the great seal charters, so perhaps he acted then north of Forth. But he was the only person so designated from 1494 to 1497; possibly for the latter part of that period he was sole justiciar. In 1498 he was described as justiciar both north and south of Forth generally constituted.³⁴³ By that time he was at the end of his career; he is not heard of as a justiciar again after that year. In 1497 Andrew lord Gray had become justiciar alongside Drummond; in 1499 he was joined by George earl of Huntly, now the chancellor. Huntly died in 1501 and Gray continued thereafter as the only justiciar. In 1503 he was described as 'justice general of the whole realm of Scots'.³⁴⁴ He can be

339. Mackie, James IV, 53.

340. Mackie, James IV, 55 - 6; Nicholson, Later Middle Ages, 536 - 8.

341. SRO, JCl/1 ff. 1 r., 7 r.

342. SRO, JCl/1, ff. 18 r., 29 r.

343. ER xi 316*.

344. APS ii 273.

regarded as the first real justice general; the office was never again divided, either regionally or between individuals.

Professor A.L. Brown has shown that Glamis, Lyle, Drummond and Gray were all key men in the administration of James IV. The same is also true of Oliphant and of Huntly, whose importance is sufficiently shown by his appointment to the chancellorship in 1497.³⁴⁵ The importance of Glamis in the council of James IV has also been stressed by Dr. T.M. Chalmers.³⁴⁶ Glamis was the second graduate to be a justiciar. Apart from Huntly and, to a lesser extent, Lyle, all were men who had been frustrated in career ambitions under James III and who had taken the side of James IV in the struggle leading to Sauchieburn in 1488.³⁴⁷ It is also important to note that all held judicial positions apart from that of justiciar, not just under James IV, but also under James III. In particular Glamis, Oliphant, Drummond and Lyle acted as auditors of causes and complaints in the parliaments of James III, while Gray was sheriff of Forfar and, under James IV, a fairly regular member of the king's council in its judicial sessions.³⁴⁸ Thus it is quite apparent that these men were seen as having talents that fitted them for judicial work and it would be wrong to suppose that they lacked legal skills and knowledge or were unable to tackle the work which fell upon them.

345. A.L. Brown, 'The Scottish "establishment" in the later fifteenth century', JR 23 (1978) 89 - 105 at 99 - 101.

346. Chalmers, 'King's council', 184 - 5, 265 - 6.

347. Brown, 'The Scottish "establishment"', 100; Macdougall, James III, 242 - 5.

348. Brown, 'The Scottish "establishment"', 100 - 1; Chalmers, 'King's council', 180 - 3, 459, 462. For Gray as sheriff of Forfar see RMS ii nos. 1806, 2257; ER xi 330*.

If this was true of the justiciars of James IV, was it also true of their predecessors? We only know about the former's judicial activities because the parliamentary and council records are nearly complete from 1488 onward. But it is possible to show that, quite apart from their general governmental work, some of the earlier justiciars performed judicial functions. Thus Robert Erskine, Archibald Douglas and William Dishington were appointed to the parliamentary committee to deal with matters touching common justice in 1370.³⁴⁹ Alexander Stewart earl of Mar sat judicially in various cases before parliament (1430) council general (1422) and council (1424), and Robert Lauder of the Bass and Edrington and Thomas Somerville of Carnwath may be found with him in some of these cases.³⁵⁰ John lord Lindsay of the Byres, William lord Somerville and Laurence lord Abernethy appear on conciliar and parliamentary sederunts dealing with legal actions in the late 1450s and 1460s.³⁵¹ Those justiciars who were or became chancellor, such as William Sinclair earl of Orkney, Andrew lord Avandale and Colin earl of Argyll, would have been much involved in the judicial work of the king's council, as well as in the legal work of the king's chapel (or chancery). The rather fragmented records of council and parliament under James III show his justiciars as active in their

349. APS i 508.

350. See Paisley Registrum, 70; Fraser, Carlaverock ii no. 31; RMS ii no. 146 (APS ii 28 no. 6) for the relevant sederunts.

351. Aberdeen - Banff Ill. iv 205 - 13; Fraser, Chiefs of Grant iii 259 - 60; Fraser, Maxwells of Pollok i no. 35; Scone Liber no. 213 (APS xii 22 no. 4). Lindsay was appointed to be one of the lords of session in 1458: APS ii 47.

judicial work. Also of interest is the membership of a committee appointed by parliament in 1482 to examine the law of purpresture. It can be safely assumed that most of these were men of legal ability. Amongst them were Robert lord Lyle and John lord Drummond (as the lord of Stobhall) as well as Richard Lawson, soon to be if not already justice clerk, John Ross of Montgrennan, king's advocate and William lord Borthwick who was to be a justice-depute in 1485.³⁵²

These last three names remind us that the justiciars did not act alone. There are numerous examples of deutes holding courts on their behalf, who appear usually to have been men less involved in the office of central government than their principals, but were also in general landowners of local prominence.³⁵³ Justiciars north and south of Forth seem each to have had their clerk in the mid-fourteenth century. Thus Adam Forrester was appointed to 'the office of clerk of the rolls of the justiciary south of Forth' in 1362³⁵⁴ and in 1366, as clerk of the rolls, he inserted a process in the justiciary rolls, having affixed the seal of the justiciary of Lothian to it.³⁵⁵ He was therefore in attendance upon the court and kept its records and seal. In 1374 Alan Lauder, a descendant of the Robert Lauders who had been justiciars under Robert I and David II, received a pension of ten pounds for his labours 'in the

352. APS ii 141.

353. For references to 'lieutenants' of the justiciar early in the fourteenth century see BL, MS Add. 33245 ff. 156 v. - 157 r; Fraser, Southesk ii no. 36 and ER i 558 - 9. From c. 1360 references are to the justice-depute: ER ii 438; Pitfirrane Writs nos. 16, 22; Peebles Chrs. no. 16; Moray Registrum no. 203; Prot. Bk. Young nos. 725, 962, 1211.

354. RMS i no. 100 and note; cf RMS i app. 2 no. 1461 and Murray, 'The lord clerk register', 127.

355. Raine, North Durham no. 326.

office of clerk of the rolls of the justiciary south of Forth'.³⁵⁶
 In 1369 William Chalmers was granted 'the office of clerk of the rolls of the justiciary north of Forth'.³⁵⁷ By 1380 Chalmers was designated simply as 'justice clerk of our lord king',³⁵⁸ and in 1398 he was still 'the justice clerk',³⁵⁹ without any particular geographical limitation to the office being apparent. However if Chalmers did become the sole justice clerk, this did not establish the office on those lines. By the middle of the fifteenth century there appear to have been 'justice clerkis',³⁶⁰ one perhaps being Robert Nairn, steward of the king and depute chamberlain,³⁶¹ while in 1473 James III appointed his familiar 'armigerum' William Haket of Belses (Roxburghshire) clerk of justiciary south of Forth; perhaps this was a reappointment, for Haket had held the office in 1465.³⁶² Professor Hannay was probably correct to suggest that the final emergence of a single 'justice clerk general' came later in the reign and it seems likely that the first holder of the office was Richard Lawson, who is well known to historians as one of the most prominent lawyers of his time.³⁶³ It is by no means impossible that this was also true of his fourteenth century predecessors.

356. RMS i no. 456; HMC v 611. For his descent, see Lawder, Lawders of the Bass, 19 - 23.

357. RMS i no. 295.

358. Moray Registrum no. 159.

359. Moray Registrum p. 210.

360. APS ii 37, c. 15.

361. ER vi 98.

362. RMS ii no. 1119; SRO, AD1/60 (Appendix D).

363. R.K. Hannay, 'The office of the justice clerk', 312 - 13; Chalmers, 'King's council', 188 - 9, 245 - 6.

Finally the justiciars must also have received support on occasion, and perhaps often, from the king himself and his council. Mention has been made of how important the king's participation in the ayres seems to have been. It was commanded by statute in 1440.³⁶⁴ His attendance would have meant that of his council and therefore that of the men who acted as judges in the so-called central courts. Evidence of the kings' personal activities in this regard has already been discussed; from time to time there may be found references to the attendance of the council as well. In 1348 a decision of the northern justiciary was reached 'de consilio jurisperitorum',³⁶⁵ while the following year several members of the king's council were with the justiciar of Scotia north of Forth when he held full court at the standing stones of Rayne in the Garioch.³⁶⁶ In 1457 James II commanded the sheriff of Forfar to summon Thomas Cullace 'to compeir befoir us and our counsaile at Dundee the secunde day of the nixt justice aire of Anguss'.³⁶⁷ During the ayre of Aberdeen in November that year seven men were summoned to compear before the king and his council on a certain day of the ayre to answer for an alleged error made by them in the service of a brieve of inquest.³⁶⁸ The apparent failure of James III and his council to attend the ayres may be reflected in the acts of 1488 appointing

364. APS ii 32, c. 2.

365. Fraser, Southesk ii no. 36.

366. Aberdeen Registrum i 79 - 81.

367. Brechin Registrum i no. 88.

368. Aberdeen-Banff Ill. iv 205 - 13.

justiciars north and south of Forth, for they directed 'that our
soverane lord send certane wise lordis and persouns of his consale
... to be assessouris and consalouris to thaim'.³⁶⁹ This probably
reflects the traditional role of council on ayre. In the spring
of 1498 there was an attempt to link council's judicial sessions
with a justice ayre in the north, but this method of organising
conciliar work was not repeated.³⁷⁰

It is therefore clear that, quite apart from the fact that in
general the justiciars themselves were members of the king's
government in other capacities, they received support on their
ayres from their fellow-councillors. There can be little doubt
that legal skill was available to them in consequence and there is
every reason to suppose that they themselves did not lack those
skills. Indeed at least in some cases it may well have been those
skills which ensured rises from relative obscurity to great prominence.
Men like the first Robert Lauder, Robert Erskine, Andrew lord Avandale
and John lord Drummond are good but surely not the only examples.
It is tempting to make something of the general disappearance of
men such as earls from the justiciarship, but it is too easy to
suppose that this reflects a change in the nature of the office from
a possession of the upper ranks of the nobility to one occupied by
'professionals'. Those fourteenth and fifteenth century earls who
were justiciars were, like their lesser colleagues, also generally
active elsewhere in government service; they were 'political' earls.
Equally the Drummonds, Lyles and Avandales of the fifteenth century

369. APS ii 182.

370. See above, 87, and note 236.

have their equivalents in earlier periods - Lauder, Erskine, Dishington, Somerville, Lindsay of the Byres. What did perhaps change was the extent to which a landed power base either north or south of Forth was of importance; from the 1450s it appears to have been of lessening significance. It is true that Huntly and Crawford, who held office north of Forth at different times between 1479 and 1500, were important landowners in the north, but otherwise the local power base seems not to matter at all. All justiciars, earls or not, were of course landowners; officers of law, in the words of a statute of 1424 which were to be echoed in 1487, needed to have 'sufficient of their own' in order to perform their function in accordance with the expectations of contemporary society.³⁷¹

In conclusion this discussion of the justiciars reinforces the view that they and their ayres played a major role in the administration of the medieval common law. Moreover it is most unlikely that these king's men played a part antithetical to good government, or were incapable of acting as judges or of comprehending the complexities of the law.

(d) Conclusions

It is thus apparent that scepticism about the administration, even the existence, of a common law in the fourteenth and fifteenth centuries is misplaced as are doubts about the survival and vigour of the system which had evolved in the two preceding centuries. The loss of record makes it difficult to discover how the system worked, how effective it was and what kind of law it produced and

371. APS ii 3, c. 6; APS ii 176, c. 2; cp. APS i 556 - 7.

operated under; but if in our surviving sources we can perceive hints of system, legal thought and structure we ought to give them full value. In the next two chapters, we will examine one of the jurisdictional rules of the medieval common law in detail and it will be shown how the law could be sustained and developed in the decentralised court structure discussed in this chapter. It will then be apparent in what context the emergence of the conciliar court and the nature of its jurisdiction should be discussed.

Chapter Three

Pleable Brieves and Freehold

(a) The rule and 'feudal theory'

It is unnecessary for the purposes of this thesis to consider in detail the origins in Scotland of the rule that no man needed to answer for his freehold save by pleable breve. Professor Harding has argued persuasively that its roots lie in grants of the king's protection which included commands that the beneficiary should enjoy quiet possession of his lands and that he should not be impleaded except before the king or his justices.¹ To this we must add the direct influence of English law, for the rule as such had first appeared in Glanvill towards the end of the twelfth century.² Indeed at the end of the thirteenth century Alexander Macdonald of Islay spoke of the rule as common to the laws of both England and Scotland,³ while the discussion of the subject in Regiam Majestatem is lifted straight from Glanvill.⁴ The rule is also stated in the Leges Burgorum in a chapter found in all the early manuscripts and so attributable to the thirteenth century.⁵ In 1317 the rule was cited and applied in the Aberdeen burgh court.⁶

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1. Harding, 'Medieval brieves of protection', 120 and 128 - 9. See in addition to the examples cited at 120 note 16, Lawrie, Charters no. 248.
 2. Glanvill XII, 2; XII, 25.
 3. Public Record Office, SC 1/18/147, printed by A.A.M. Duncan and J.G. Dunbar, 'Tarbert Castle', SHR 50 (1971) 1 - 16 at 15 - 16. See also *ibid.*, 3 - 5 and Barrow, Bruce, 80 and note 3, 209.
 4. Regiam Majestatem III, 23, from Glanvill XII, 25.
 5. Ancient Burgh Laws, 21 (c. 43).
 6. Aberdeen Burgh Recs., 10 - 14.

The establishment of the rule in Scotland was not therefore the result of a statute enacted in 1318 which stated that 'no one is to be ejected from his free holding [liberum tenementum suum] of which he claims to be vest and saised as of fee without the king's pleadable brieve or some similar brieve nor without being first reasonably summoned to a certain day and place for his free holding'.⁷ Why then was this statute necessary? Indeed it is surprising to find such a provision amongst the legislation of that 'feudally conservative' king Robert I, for the rule it embodied is usually seen by English legal historians as 'anti-feudal' in effect if not in intention, in that it seems to have destroyed the jurisdiction of seignorial courts in England over land disputes, which in 'feudal theory' was an exclusive one.⁸ Robert I by contrast is usually seen as 'revitalising' the feudal institutions of the barony and the regality with their extensive franchisal powers.⁹ What then lies behind the act of 1318?

One explanation may lie in the political background to the act. Following his victory at Bannockburn in 1314, Robert I had his parliament declare that all who would not come into his peace would

7. APS i 473, c. 25.

8. See F.W. Maitland, The Forms of Action at Common Law edd. A.H. Chaytor and W.J. Whittaker (Cambridge, 1936, reprinted 1968); T.F.T. Plucknett, Legislation of Edward I (Oxford, 1949) 24 - 29; Brevia Placitata ed. G.J. Turner (Selden Soc., vol. 66) lxxviii; D.M. Stenton, English Justice between the Norman Conquest and the Great Charter 1066 - 1215 (London, 1965) 26 - 30; Royal Writs in England from the Conquest to Glanvill ed. R.C. van Caenegem (Selden Soc., vol. 77) 213 - 25 (also his Birth of the English Common Law (Cambridge, 1973) 25 - 8); Milsom, Legal Framework, 57 - 9; R.C. Palmer, The County Courts of Medieval England 1150 - 1350 (Princeton, 1982) 142 - 7 (also his 'The feudal framework of English law', Michigan Law Review 79 (1981) 1130 - 1164).

9. See Barrow, Bruce, 410; Nicholson, Later Middle Ages, 111.

be forfeited.¹⁰ Thus those who held lands in both Scotland and England had to choose to which crown they would in future give their allegiance; those who chose to be subject to the English king would lose their lands. This had happened to many even before 1314 and the lands had been granted out instead to supporters of king Robert. Coupled however with the return of former owners to Scottish allegiance after 1314, a complex situation arose. Professor Barrow's full review of the handling of this situation leads him to the conclusion that 'king Robert held fast to the principle that there should be no disinheritance of men and women claiming property by hereditary right, provided that they were prepared to swear allegiance to him', and that 'the king's dealings with regard to property and the services rendered by its holders were informed by a spirit of conservatism and restoration'.¹¹ Such a policy must however have led to clashes between those returning disinherited and those who had benefited from forfeiture of their lands. No doubt there were compromises. An instructive example is that involving the loyal Adam the marischal who was given the barony of Manor in Tweeddale on the forfeiture of its owner, Alexander Baddeby, in 1309. Baddeby re-entered Scottish allegiance after Bannockburn and Manor was divided between him and Adam, presumably by agreement. But in 1323 Baddeby unsuccessfully sought restoration of the whole from the king.¹² It is surely against a background where the king's loyal adherents were uncertain

10. APS i 464.

11. Barrow, Bruce, 380 - 92.

12. RMS i app. 1 no. 96; Barrow, Bruce, 392.

to what extent they would be able to retain their new lands against the returning disinherited that parliament enacted in 1318 that no man could be put out of his free holding without the king's pleadable brieve. There was nothing anti-feudal about this; it was a move in the interests of security of tenure and the status quo. Those in possession could only be put out through due process of law.

This however is not to say that the rule had no effect on the feudal jurisdictions of the barons and other lords. Rather it seems certain that it did have an effect even before the passage of the 1318 act. Writers on Scottish franchise courts commonly - and correctly - emphasise the paucity of evidence upon which to base any conclusions regarding their jurisdiction in medieval times. Generally it is assumed that the lord had jurisdiction to try the title disputes of his tenants,¹³ although I have not found any explicit statement in the sources to this effect, and certainly there are examples of land disputes being taken in franchise courts. To understand the effect of requiring a brieve in such cases, we must look at the rule in England, where, according to Glanvill, the effect of the rule requiring writs was that the demandant should have a writ of right directed to the lord of whom he claimed to hold, ordering him to do full right. The writ concluded by threatening transfer

13. In his edition of the Court Book of the Barony of Carnwath, W.C. Dickinson cites in a footnote the statement of W.S. McKechnie in Magna Carta (2nd ed., 346), 'In pleas of disputed titles to land, feudal theory gave sole jurisdiction to the lord of the fief. No principle was more absolutely established than this', but makes no comment on its applicability in Scotland: Carnwath Court Bk., xi, note 2. In a subsequent article, he was less cautious: 'Administration of justice', at 340 and 350. Similar views may be found in the introduction to Acta Dominorum Concilii 1501 - 1503 J.A. Clyde at xxxvii - xxxviii, where there is heavy reliance on the much later authority of Craig's Jus Feudale.

of the case to the sheriff in the event of the lord's disobedience.¹⁴ Thus there was a writ by which cases relating to land would start in their 'natural' forum, the court of the lord of whom the land in question was held. In Scotland there was in the thirteenth century a breve called 'de recto',¹⁵ but when we are given a style for it in the Ayr manuscript,¹⁶ we seem to be in the presence of something very different from the English writ. It runs as follows:

The king to the sheriff. We command etc that you cause N. the bearer of the presents to have full right of four carrucates of your bailiary which he claims to hold of us heritably, rendering therefor to us twenty silver shillings annually and giving such forinsee service and aid as pertains to the service of half a knight; of which carrucates of land with the pertinents R de B unjustly deforced him, as he says, acting thereupon so that for no defect of right etc.

There is another exactly similar style in the Ayr manuscript addressed to 'the provosts and bailies of the burgh of A.',¹⁷ while both the Bute manuscript and Quoniam Attachiamenta contain styles, again exactly similar, addressed to the sheriff.¹⁸ The styles reflect early fourteenth century practice. By good fortune we have surviving the text of a breve of right addressed to the burgh court of Aberdeen in 1317 and sewn to the roll of the court.¹⁹

14. Glanvill XII, 2 and 13.

15. See Stones and Simpson, Edward I ii 342 - 3 and Stevenson, Documents i 384 - 6 for references in the late thirteenth century.

16. Reg. Brieves, 39 (no. 18).

17. Reg. Brieves, 40 (no. 19).

18. Reg. Brieves, 61 (no. 91); Quoniam Attachiamenta c. 57.

19. Aberdeen Burgh Recs., 7 - 8.

It may be translated thus:

Robert by the grace of God king of Scots to his faithful officers and bailies of Aberdeen greetings: We command and ordain you that you cause John son of Laurence and Marjory daughter of the late Brice de Cragy, his wife, to have full right by reason of their said marriage of a perticate of land with the pertinents lying in the said burgh of Aberdeen on the eastern side of the street known as Gallowgate, between the lands which belonged to the late William Fiechet on the southern side at one end, and the lands on the northern side which belonged to the late Reginald de Grendoun at the other, which perticate of land with the pertinents he claims to hold of us heritably by reason of his said wife, rendering annually therefor to us and our heirs six silver pennies in this way, three pennies at the feast of Pentecost and three pennies at the feast of St. Martin, also rendering to the brothers of the order of the Trinity in Aberdeen six shillings and eight silver pennies half-yearly, in this way, at the above mentioned feast of Pentecost and the other half at the foresaid feast of St. Martin, of which perticate of land with the pertinents Emma, daughter of the foresaid late Brice de Cragy, has unjustly deforced them, so they say, acting thereupon so that we do not hear any just complaint for want of full right therein.

The Scottish brieve of right seems then to have been a form which commenced action directly in the royal courts. In this it is sharply distinct from the English writ of right. But the influence of the latter is discernible in the Scottish brieve in its formula of 'full right' and the accusation of 'deforcement' by a third party. It is important however to notice that in all the styles the bearer of the brieve is said to be one who claims to hold of the king: in other words, to be a tenant-in-chief. Feudal theory would suggest that it was perfectly proper for such a person to sue for his lands in the king's court. We thus seem closer to the thirteenth century English writ praecipe in capite which after

Magna Carta was only available to tenants-in-chief, to enable them to recover their lands from another.²⁰ It is worth setting out the form of this writ also:²¹

The king to the sheriff greeting. Command B. that justly and without delay he render to A. ten acres of land with appurtenances in such a vill which he claims to be his right and inheritance and to hold of us in chief and whereof he complains that the aforesaid B. deforces him; and if he does not do it and the said A. shall have given you security to prosecute his claim, then summon by good summoners the aforesaid B. that he be before our justices at Westminster to show why he has not done this, and have there the summoners and this writ.

Again elements of the Scottish briefe can be seen to have derived from this writ: the statement that the demandant holds in chief of the king and that he claims by heritable right. But it is important to note that the praecipe in capite was not a breve de recto and that for much of the thirteenth century the two were carefully distinguished by English lawyers. Maitland states that 'in course of time the term "Writ of Right" gains a somewhat extended sense and is used so as to include the praecipe in capite,'²² because by both writs the demandant recovered full proprietary right. He did not give chapter and verse for this statement and the point does not seem to have been dwelt upon by subsequent writers. Perhaps the beginnings of knowledge on this point may be

20. Clause 34 of Magna Carta 1215 forbade the issue of praecipe writs so as to deprive lords of their jurisdiction. Accordingly only the king's tenants could use the praecipe, and the writ praecipe in capite was introduced. See below, 132.

21. See Early Registers of Writs edd. E de Haas and G.D.G. Hall (Selden Soc., vol. 87), 18.

22. Maitland, Forms of Action, 19.

found in the Early Registers of Writs published by the Selden Society where may be found a writ in the praecipe form being described as a 'breve de recto'.²³ It commands B. to render land to A. or else answer before the king's justices. There is no statement that the land is held of the king; instead it is stated that its lord has remitted his court. Such a clause, like the statement about the lands being held in chief, had been made necessary by clause 34 of Magna Carta which laid down that praecipe writs should not be issued if there was a lord with jurisdiction. Thus praecipe writs had always to show that this provision was met, and the praecipe quia dominus remisit curiam suam did so.²⁴ Its description by the 1260s as a 'breve de recto' is thus of some significance; it shows that by this time the development referred to by Maitland was under way.

A further point of interest is to be found in the Statute of Wales of 1284, which gave a number of writs to be available henceforth to the English king's Welsh subjects. Although these included novel disseisin and mort d'ancestor, there is no sign of writs of right or praecipe, at least under those names. Instead the Welsh were to have what the statute called the breve commune or general writ.²⁵ This took the form of the praecipe quod reddat, the writ found in Glanvill and used in England prior to Magna Carta to enable any dispossessed land holder to recover his property before

23. Early Registers of Writs, 36 (no. 8), 113 (no. 23).

24. M.T. Clanchy, 'Magna Carta, clause thirty four', English Historical Review 79 (1964) 542 - 547.

25. Statutes of the Realm i 60.

the king's justices, regardless of whether or not he held in chief.²⁶ It was the use of this writ which clause 34 of Magna Carta sought to limit in 1215, but that did not of course apply to Wales. The point of interest for us has recently been demonstrated by L.B. Smith; the writ was referred to in the courts as the 'breve de recto' of the laws of Wales.²⁷

We can now return to the Scottish brieve of the Ayr manuscript and state some conclusions. The form as we have it is a combination of the English writ of right and writ praecipe. In many ways it is more like the latter, even to the extent that both were sent out of the king's writing-office 'close' where the writ of right went 'patent'.²⁸ Nevertheless the Scottish brieve takes the title 'de recto'. Given the obvious influence of the English writs, and the discussion of the term 'breve de recto' above, it is hard to resist the inference that the Scottish brieve as it appears in the Ayr manuscript is a form of the latter part of the thirteenth century. And it gets its title because it is the way in which full proprietary right may be reclaimed.

Discussing the rule requiring brieves to compel a man to answer for his lands, Lord Cooper commented that 'so far as has been noted there are no examples in the Scottish records of the period

26. See Clanchy, 'Magna Carta, clause thirty four', 543 - 5.

27. L.B. Smith, 'The Statute of Wales 1284', Welsh History Review 10 (1980 - 81) 127 - 154 at 141 - 4.

28. See A.A.M. Duncan, 'The acta of Robert I', SHR 32 (1953) 1 - 39 at 8, commenting on the brieve of right sent to Aberdeen burgh court in 1317.

of a brieve of right addressed to a baron'.²⁹ This would hardly be surprising if the brieve of right was in fact confined to cases involving tenants-in-chief. However there are cases on record in which action was begun in a franchise court by a royal writ. In none of them are we told that the writ was a brieve of right or that it commanded the lord in question to do right, but in examining each of the cases it is worth bearing in mind the argument of Professor Harding, that the twelfth century royal protection might be enforced by orders 'facere rectum', and, in addition, a document of 1165 x 1166 in which it is stated that actions against the men of Holyrood abbey should be begun by a request to the abbot to do full right (plenum rectum); if he fails to do so, then the sheriff and the justice will do it instead.³⁰ This sounds exactly like the English writ of right. And there should also be remembered another point, made by Professor Milsom, that there is no warrant for believing that the 'full right' claimed was a complete proprietary right to land in the early period; it was merely a command to the addressee to put right some wrong which it was in his power to correct.³¹

All our Scottish cases come from the thirteenth century. The earliest of these is, to judge from the witness list to the document in which it is recorded, from the 1230s. The document

29. Cooper, Regiam, 213.

30. Harding, 'Medieval brieves of protection', 119, 126;
RRS ii no. 39.

31. Milsom, Historical Foundations, 124 - 6.

notes a quit-claim of the monks of Durham serving God at Coldingham made by Matthew of Houberne for certain lands in Coldingham 'of which he had impleaded the prior and convent of Coldingham by brieve of the lord king in the court of the same prior of Coldingham'. The witness list is headed by the sheriff of Berwick, William de Lindsay; was he there to do right had the prior refused to do so?³² A second, less explicit, case may be the quit-claim of the prior and convent of Coldingham made by Michael of Auchencrow of half a carrucate in Old Cambus 'which he claimed by brieve of the lord king'.³³ It is not stated in which court the claim was made, but the witnesses to the quit-claim are the suitors of the prior's court in the 1240s. Yet another case from the prior's court is the one in which Bertram son of Henry of Ulvestoun impleaded his cousin Waldeve Kokes for two oxgangs of land in Nether Ayton 'by letters of the lord king'. Again we are not told to which court these letters were addressed, but the eventual settlement was reached 'in the full court of the lord prior of Coldingham at Ayton'. The name of the sheriff of Berwick is second in the list of witnesses to the compromise.³⁴

Moving from Berwickshire we must go to the Lennox for our final case, which was part of a cause célèbre in thirteenth century Scottish legal history, the so-called Monachkenneran dispute.

32. Raine, North Durham no. 296.

33. Raine, North Durham no. 91.

34. Fraser, Keir, 197 - 8.

This arose in the 1230s out of the activities of one Dougal, a younger brother of the earl of Lennox and rector of the church at Kilpatrick on the north bank of the Clyde estuary. The church had been granted to Paisley abbey by the earl of Lennox but Dougal alienated the lands attached to it without the abbey's authority. The abbey recovered the lands in a series of actions before papal judges delegate, but allowed Dougal to retain his position as rector for life. He died in 1270, and in the following year his three grand-nieces were served as his co-heirs. Thereafter these ladies, together with the husbands, raised actions by royal letters in the earl's court against Paisley abbey, claiming rights in some of the lands attached to the church of Kilpatrick. The abbey bought off their claims for substantial sums. What was the nature of the claim against the abbey? As we have seen the lands were held of the earl of Lennox, so that a dispute about them naturally fell within the jurisdiction of his court. Grand-nieces at this time could not have used the *briefe of mortancestor*, since they were outwith the degrees of relationship for the form of action. It seems very possible that the 'royal letters' took the form of a *briefe* along the lines of the English writ of right.³⁵

We may therefore tentatively suppose that in thirteenth century Scotland there was a *briefe* available to those who claimed to hold of a subject-superior rather than of the crown and which would have been addressed to the superior's court. There is no warrant for calling this a *briefe of right*, nor really for suggesting that it

35. For the three quit-claims, see *Paisley Registrum* 180, 192 and 198. For the earlier history of the *Monachkenneran* dispute, see *ibid.*, 157 - 70. Until 1318, a person could only sue by *briefe of mortancestor* in virtue of a claim through parents, uncles, aunts and siblings: see below, 202.

commanded the addressee to do right or else the sheriff would. But it does appear that there were different remedies for the tenants-in-chief and for those on lower rungs of the feudal pyramid. Given what we know about the extent of English influence of the development of the Scottish formulary system, it seems likely that these brieves bore some resemblance at least to the English writs praecipe in capite and de recto.

But if this was so, it had ceased to be the case by the time of the Ayr formulary where, as Lord Cooper correctly points out, there are no styles addressed to the holder of a franchise court other than those connected with the giving of sasine.³⁶ However this does not mean that the man who held of a subject-superior had lost a remedy once available to him. Regiam gives the form for the statement of claim by the pursuer on the brieve of right, and by this he is made to say that he claims to hold the lands 'heritably of the lord king or of another lord'.³⁷ Thus it would seem that the brieve of right which pertained to the sheriff was available to enable the sub-tenant to recover his lands by the time this part of Regiam was written. It is worth noting that it appears in that opening section of Regiam which owes little to other works and which appears faithfully to reflect Scottish practice in the reign of Robert I. Perhaps then we can see a course of development here whereby the brieve which had been available only to tenants-in-chief became one for general use. If the normal procedure on a brieve addressed to a subject-superior's court was in any event for the case to be transferred to the sheriff,

36. Reg. Brieves, 13, 17.

37. Regiam Majestatem I, 9.

then this would have been a sensible rationalisation along lines similar to those already shown to be working in contemporary England and Wales.

The disappearance of the *briefe* addressed to the holder of the franchise court may suggest a decline in the regularity with which proprietary disputes were tried in these courts in the later medieval period and that the jurisdiction which is implied by the existence of the *briefe* of the thirteenth century had ceased to have substantial meaning. This may be confirmed by a 1358 grant of David II to the warden of the mint of jurisdiction over all pleas concerning his men, excepting only those of the crown and of freeholding.³⁸ Although this is not expressly said the latter exception is presumably because such pleas had to be begun by *briefe* in the royal courts. Thus here a franchise was limited through this common law rule.

Against this it can be argued that from the reign of Robert I the concept of a franchise of regality 'where the king's writ did not run' became very clearly defined.³⁹ How could a man claim that he must be impleaded by *briefe* if his lands were in a jurisdiction where the king's *briefes* had no force? It seems clear however that the rule applied equally within regalities as without. Thus Robert I made two grants of land to Thomas Randolph in regality 'with the four complaints belonging to our royal crown and with all

38. RRS vi no. 170. This grant survives only in the form of a late translation of the original.

39. On regalities see Carnwath Court Bk., xxxix - xlv; Dunfermline Court Bk., introduction, passim; Grant, 'Higher nobility in Scotland', 111 - 114.

pleas and complaints both in common indictments and in pleadable
 brieves'.⁴⁰ It seems highly probable that this meant that the
 lord of regality was empowered to issue pleadable brieves within
 his regality wherever the king would have done so elsewhere. We
 know that the regality chancery of the archbishop of St. Andrews
 had styles for brieves of right, mortancestor and others in the
 sixteenth century, running in the name of the archbishop but
 otherwise exactly similar to those issued by the king.⁴¹ In 1433,
 a brieve of dissasine was presented to the justice-ayre of the
 regality of Atholl, but was finally dealt with in the king's justice-
 ayre at Perth.⁴² Similarly a brieve of distress was issued by the
 chancery of the regality of the Garioch in 1407.⁴³ Brieves of
 lining were common in the court of the regality burgh of Dunfermline.⁴⁴
 In other words, the regality seems to have been a microcosm of the
 kingdom and the rule requiring brieves in cases of freehold could
 have been and almost certainly was operative there as well.

Thus far we have been looking at the constricting effect upon
 non-royal jurisdictions which the rule under discussion may have
 had. We now turn to the limitations of the rule itself in relation
 to these courts; limitations that do not appear from the terms in
 which it was formulated (those are discussed in the next section).

40. RMS i app. 1 nos. 31 and 34.

41. St. Andrews Formulare i 251 - 4.

42. Coupar Angus Chrs. ii no. 128.

43. Aberdeen Registrum i 212.

44. Dunfermline Burgh Recs., 43. See also Dunfermline Court Bk.,
 8 - 10.

They can however be drawn from Regiam Majestatem and Quoniam Attachiamenta when they discuss the causes for which a man may be dispossessed by his lord. Both treatises state the rule,⁴⁵ but also describe a number of situations in which the lord can take action against his tenant's lands and in some of these Regiam at least is explicit on the point that the lord can do this without brieve. If the tenant fails to perform his services⁴⁶ or render aids,⁴⁷ lays violent hands on the lord⁴⁸ or does anything tending to the disinheritation of his lord,⁴⁹ then he is liable to lose his lands in the lord's court even though not impleaded by brieve. Quoniam also discusses the failure to perform services in some detail, explaining that the lord may summon the tenant to his court and ultimately recognosce his lands. It is not said here that the lord may act without brieve, but the whole tenor of the chapter suggests that the lord is acting throughout on his own authority.⁵⁰ Elsewhere Quoniam also notes that lands may be escheat to their lords if the tenant commits murder,⁵¹ which seems to be a

45. Regiam Majestatem III, 20; Quoniam Attachiamenta ch. 18.

46. Regiam Majestatem II, 58.

47. Regiam Majestatem II, 67.

48. Regiam Majestatem II, 58.

49. Regiam Majestatem II, 58.

50. Quoniam Attachiamenta ch. 30.

51. Quoniam Attachiamenta ch. 14.

specific instance of the principle stated in Regiam that the lands of the convicted felon or thief revert to his lord.⁵² It is also said twice in Regiam that the heiress in ward of her lord who is unchaste loses her inheritance,⁵³ and that the man without a son who marries off his daughter-heiresses without his lord's consent forfeits his lands.⁵⁴ Nothing is said about the lord needing briefs as a preliminary to taking action by virtue of these rules.

The striking thing about the Regiam passages is that they are all borrowed from Glanvill and have recently been discussed in their English context and in relation to the requirement of writs in cases touching freehold by Professor Milsom.⁵⁵ As he points out, the factor which connects these various causes of disinheritance or forfeiture is some breach by the tenant of the duties he owes to his lord for his lands. This is obvious in the cases of failure to perform services or render aids, but it is also true of the act of felony. The rules about heiresses also make sense in this context, since the lord's interest is to ensure that the heiress is marriageable and that when she marries it is to a person fit to perform the services due from the lands. Professor Milsom argues accordingly that there can be drawn from Glanvill a distinction between the 'disciplinary' and the 'proprietary' jurisdiction of a lord over his tenants and that

52. Regiam Majestatem II, 48, 50.

53. Regiam Majestatem II, 44, 48.

54. Regiam Majestatem II, 43.

55. Milsom, Legal Framework, 25 - 7; the relevant references in Glanvill are given at p. 26.

the rule requiring royal writs to initiate the action applied only to the latter. The essence of the disciplinary jurisdiction was the lord's power to eject his tenants for failure to perform their duties; but it was 'squeezed out' by the possibility that if the lord failed to follow due process in its exercise he made himself liable to an action of novel disseisin by his tenant and also 'by misunderstanding about the need for writs'.⁵⁶

Assessing the significance of these passages in Regiam is complicated by the vexed question of its relation to Scottish practice. But, as has been pointed out in the first chapter, it was undoubtedly regarded as an authoritative text in the later medieval period⁵⁷ and could accordingly have been used to justify action by a lord against his tenant's lands without breve. We can see some of the Regiam rules reappearing in Quoniam, in particular the one concerning services; perhaps this was the most common cause of disciplinary action and here of course Regiam was quite clear that no breve was needed. Thus when the baron of Dirleton in East Lothian turned his tenant William Fenton out of the lands of Fenton in the 1380s, apparently without breve, it may be that he was purporting to exercise this disciplinary jurisdiction.⁵⁸

Another area in which the lord might take action against his

56. Milsom, Legal Framework, 27. This concept of the lord's 'disciplinary' as distinct from his 'proprietary' jurisdiction is accepted in E. Searle, 'Seignorial control of women's marriage: the antecedents and function of merchet in England', Past and Present no. 82 (1979) 3 - 43 at 8 - 11. A valuable critique is P.A. Brand and P.R. Hyams, Past and Present no. 99 (1983) 123 - 133 at 124 - 6.

57. See above, 26 - 7.

58. APS i 552 - 3.

tenant, apparently without brieve, is purpresture. Again the discussion of this topic in Regiam is lifted almost straight from Glanvill.⁵⁹ Purpresture is defined as encroachment by a tenant upon the demesne of his lord. The lord can summon the offending tenant to his court and conviction leads to forfeiture of the lands held of the lord by the tenant. In Glanvill however there is a form of writ by which such actions have to begin, to which there is no equivalent in Regiam. Professor Milsom sees the writ as something of an oddity requiring explanation in that purpresture was clearly part of the lord's disciplinary jurisdiction and therefore no writ ought to have been necessary. The writ emerged, he suggests, because the action challenged the tenant's right, not to his own tenement (although the disciplinary jurisdiction would forfeit that), but to the land upon which he was alleged to have encroached.⁶⁰ Confusion of thought therefore suggested that there should be a writ, in accordance with the general rule. Scottish lawyers seem to have avoided this confusion. In the later fifteenth century there seem to have been some doubts about jurisdiction in purpresture,⁶¹ but it is apparent that the action remained competent in baron courts and does not appear ever to have required a brieve in Scotland.

Feudal discipline seems also to link two other subject-matters in which the Scottish lord could take action in his court against the tenant and his lands, recognition for unlicensed alienation and showing the holding. Over twenty-five years ago R.M. Maxtone-

59. Regiam Majestatem II, 68; Glanvill IX, 11 - 13.

60. Milsom, Legal Framework, 27.

61. See APS ii 133, 141; ADA, 91; ADC i 45, 59, 74.

Graham demonstrated that, no matter what Quoniam might suggest, no brieve was required to compel the tenant to show his holding in his lord's court and concluded that 'unless a very narrow construction be put on [the rule] - that no one with an ex facie valid title can be evicted without royal brieve - it cannot be said to express the law of Scotland'.⁶² Elsewhere he showed that the main purpose of the action was to enable lords to ascertain the terms on which tenants held their lands and to ensure the preservation of their written titles. This looks very much like an exercise of disciplinary powers over tenants, especially as the tenant who failed to produce his charters or who was shown to be holding in a way inconsistent with their terms lost his lands.

Similarly, recognition for unlicensed alienation was a power with an obvious disciplinary nature. Here the tenant who sold his lands or part of them to the extent of more than one half to another without his lord's consent would lose his holding completely.^{62a} Such a power reflects the personal element of the ideal feudal relationship, and had the practical effect in medieval Scottish conveyancing that transfer of land was normally by resignation to and regrant by the lord, or by confirmation.⁶³ A statute of 1401⁶⁴ laid down rules on the procedure to be followed by the lord's court

62. R.M. Maxtone-Graham, 'Showing the holding', JR 2 (1957) 251 - 269, at 254 - 5.

62a. See APS i 492.

63. See Grant, 'Higher nobility in Scotland', 197 - 211.

64. APS i 575.

in such cases, which probably amounted to no more than a re-statement of the existing law. No mention is made there of any need for a bribe, although the result of the procedure was to deprive the tenant of his lands. The lord's court seems to have retained this element of its disciplinary jurisdiction throughout the fifteenth century; in 1497, Sir Simon Preston of that ilk falsed the doom of the baron court of Coulter concerning his alienation of lands in the barony which he held of Robert Menzies of Enach. The baron court had decreed that for this the lands should be recognosced in the baron's hands.⁶⁵

It seems therefore that the division of franchisal jurisdiction suggested by Professor Milsom holds good for medieval Scotland and also survives for a much longer period than in England. Thus the rule requiring writs or bribes to put a man out of his freehold did not apply to disciplinary disputes in Scotland and this seems to explain a good deal of admittedly extremely scattered evidence. The reason for the non-application of the rule to such cases is not clear, but it is tentatively suggested that it was because the issue in disciplinary cases was not the ownership of the tenant's land, but the commission of wrongs against the lord. The loss of the land if the wrong was established was the penalty and not the issue at the centre of the dispute. Accordingly it can be said that the conclusion of R.M. Maxtone-Graham on the relation of the rule to showing the holding was based on a failure fully to grasp the nature both of showing the holding and of the rule requiring bribes in cases of freehold. It is of some significance that the English

65. Prot. Bk. Young nos. 875 and 896; see also, for another recognition for alienation in a baron court, no. 895.

equivalents of showing the holding (an action of quo waranto in the lord's court) and of recognition for unlicensed alienation both disappeared in the course of the thirteenth century. Professor Milsom has shown that in the case of quo waranto this was due to the misunderstanding about the need for writs in Glanvill's scheme⁶⁶ and has suggested that the lord lost his power to take back lands for alienation because the tenant's grantee might bring novel disseisin.⁶⁷ The survival of both powers in Scotland shows that, while the rule about the need for brieves was part of the law, it was understood not to apply to inhibit a lord's disciplinary jurisdiction.

(b) The scope of the rule from 1318

Whatever its earlier origins, from 1318 the source of the rule that no man need answer for his lands without the king's brieve was taken to be the statute of Robert I. Thus in 1382 it was said to be 'according to the statute of king Robert' that he who had held 'for years' ought not to be expelled from possession without a pleadable brieve.⁶⁸ Similarly in 1398 the bishop of Moray argued that 'according to the statute of king Robert' his church of Moray could only be put out of its immunity from suit at the sheriff court of Inverness, a freedom held for years and more, by pleadable brieve.⁶⁹ Sometime in the reign of Robert II it was argued that

66. Milsom, Legal Framework, 45 - 7.

67. Milsom, Historical Foundations, 115, 143.

68. Aberdeen Registrum i 155.

69. Moray Registrum, 209.

'according to the statute of the last king Robert no-one ought to be ejected from any land of which he claims himself to be vest and saised without a pleadable brieve'.⁷⁰ It is therefore necessary to examine the formulation of the rule found in the statute as the first step towards the determination of its scope in the later medieval period.

The 1318 statute states that no-one is to be ejected from his free holding [liberum tenementum suum] without the king's pleadable brieve. Two points seem to require closer scrutiny here: first the nature of a liberum tenementum, second what a pleadable brieve was.

(i) Free holding in Scots law

This topic was discussed in some detail almost forty years ago by Lord Cooper and Professor Dickinson. The former addressed himself in a short note to the question, 'What was the freehold or liberum tenementum or franktenement, to which we find many references in our early legal records?'.⁷¹ Bringing together extracts from Regiam Majestatem and other medieval sources, he concluded that by the reign of Robert I liberum tenementum was used in correlation with the term feodum, or fee, to describe an interest in land which would endure only for the holder's lifetime. Feodum or fee, by contrast, described heritable interests which would pass to the current holder's heirs on his death. In the vernacular liberum tenementum was rendered as 'franktenement' until its Romanisation

70. Moray Registrum, 379.

71. T.M. Cooper, 'Freehold in Scots law', JR 57 (1945) 1 - 5.

in the early modern period as usufruct or liferent. Lord Cooper finished his article by asking whether this interpretation of liberum tenementum in the context of the private law of landownership applied also in public law: specifically, to the right of freeholders, or libere tenens, to attend Parliament. It was this question which Professor Dickinson sought to answer.⁷² He pointed out that initially the prime distinction between the freeholder and other occupiers of land was that his holding was free, with an obligation of suit at his lord's court, that is, parliament in the case of the king's tenants-in-chief. In the fourteenth century some of the king's freeholders became barons, so giving rise to a distinction between them and other freeholders; but the latter were those who held in chief of the king in fee and heritage alone, without the jurisdictional privileges conferred by a grant in liberam baroniam. But the phrase liberum tenementum was not used to describe the holding of such a libere tenens. Liberum tenementum was used to describe the holding of a person where the feodum or fee was held by another. This could best be illustrated by a practice that developed in the second half of the fourteenth century and subsequently became customary amongst landowners, whereby the holder of a fee resigned his lands to his superior in favour of another, typically a son. The superior would then grant the fee to the son subject to the reservation of a liberum tenementum in favour of the father. Thus the fiar of the lands became 'not the person who holds a fief, but the person who has a reversionary right to a fief which is subject

72. W.C. Dickinson, 'Freehold in Scots law', JR 57 (1945) 135 - 151.

to a liferent'.⁷³ This conclusion is reinforced by the apparent fact that the holder of the liberum tenementum continued to act as owner of the land by, for example, paying suit at the superior's court. In this way the holder of a liberum tenementum could appear to be a libere tenens, causing conceptual confusion even in the writings of such distinguished jurists as John Skene and Thomas Craig.

Professor Dickinson's article suggests that much of their confusion arose from the equation of liberum tenementum with the Roman institution of usufruct and a difficulty in consequence in seeing that the nature of the holding, while not amounting to outright ownership, was certainly not limited to a jus utendi or jus fruendi. Professor Dickinson remarked that perhaps Skene and Craig in describing the holding of the libere tenens as a liberum tenementum were groping after the pure doctrine of earlier Scots law and that the definition of liberum tenementum which held sway in the later middle ages was an English corruption; with respect it seems more likely that here as elsewhere the jurists were guilty of pressing feudal wine into Roman bottles, albeit with limited success.

Another Regiam passage discussed by Lord Cooper shows how the compiler saw the freehold as part of the fee.⁷⁴ The man who had freehold might also have the fee; the man who had the fee might give the freehold away and, as Professor Dickinson showed, retain what amounted to a reversionary interest only but which was still the fee.

73. Dickinson, 'Freehold', 146.

74. Regiam Majestatem IV, 40; Cooper, 'Freehold', 2 - 3.

Regiam suggests that the nature of the remedy against dispossession might vary according to the nature of the right claimed. This aspect of the passage will be given detailed consideration in the next chapter. The crucial point for present purposes is that when the act of 1318 said that no-one was to be put out of his freeholding without the king's brieve, it was not intended to confer rights only upon him who had a mere freehold and nothing else; a fiar in possession had a free holding and he could not be ejected therefrom except by court action begun by the king's brieve.

This conclusion is also borne out by a passage found in some of the 'auld lawes' manuscripts which proclaims itself to be a statute of Robert I.⁷⁵ Lord Cooper described it as a 'mature formulation of theory'.⁷⁶ It states that there may be three interests in land: possession, as when one holds land in security, liberum tenementum, when one has lands for the term of one's life, and fee, when a man may not have recourse or entry to his land until after the death of him who has the freehold. The passage concludes that all three interests may be claimed by one person and gives as an example of someone who ought to have possession, freehold and fee the person ejected unjustly from his heritable lands.

When we turn to the cases in which the statute or rule was pleaded or referred to after 1318, it can be found in use to defend those claiming to hold by a heritable title. Thus William, Richard and Henry Graham of Hutton stated that they understood the law to be that anyone 'in peseabyll possessioun in any lande clamande it of

75. APS i 722.

76. Cooper, 'Freehold', 3.

fee and herytage ... aucht nocht to ga owte of his possessioun
forowte the kyngis brefe pledabyll'.⁷⁷ The rule was referred to
in the interesting legal battle which developed over the succession
to the Douglas lands after the death without male heirs of the second
earl, James, in the battle of Otterburn in 1388. His sister Isabella
was his heir at law and her husband Sir Malcolm Drummond seems to
have obtained sasine of the lands on her behalf. But in terms of
a tailzie of 1342 the earl's illegitimate cousin, Archibald Douglas,
was the heir entitled to take the lands and the earldom. Archibald
showed the tailzie and established his rights in parliament in 1389
when it was also declared that those wishing to pursue alternative
claims to the lands should proceed by pleadable briefes.⁷⁸ Here
again the rule was being invoked in favour of one who alleged a
heritable title, albeit the order of inheritance was subject to the
limitation of a charter of tailzie.

All the other references to the rule were made by ecclesiastical
foundations where church lands or rights were under discussion. In
such situations it was wholly inappropriate to talk either of
inheritance or of holding for a lifetime, yet the 1318 statute
clearly applied. There are two very similar statements of the
law in the registers of the cathedrals of Aberdeen and Moray, both
invoking the statute of king Robert where heirs of those to whom
church lands had been alienated sought service to those lands by the
king's briefe of inquest. Each text states that the bishop should

77. HMC Various Collections v 77.

78. APS i 557 - 8. For the background see Nicholson,
Later Middle Ages, 201 - 2.

have the brieve indorsed thus:⁷⁹

Sasine is not given because the said bishop claims himself vest and saised of the said lands as of ecclesiastical endowment (ut de dote ecclesie) and in pure alms, and according to the statute of king Robert one ought not to be expelled from possession who holds for years without pleadable brieve.

With regard to the meaning of freehold, perhaps the most interesting of the cases concerning the church are found in 1369 and 1398. In the second of these, as has already been mentioned, the bishop of Moray claimed that under the 1318 statute no-one could deprive the church of its immunity from paying suit at the sheriff court of Inverness without the king's pleadable brieve.⁸⁰ Presumably therefore it was at least arguable that this immunity was a freehold within the meaning of the act. The 1369 case was about a claim to multures of the prior and monks of Pluscarden. They alleged that they had had peaceful possession for forty days and more and that, accordingly, it was 'against the customs of the realm' for them to be put out 'without a pleadable brieve'.⁸¹ It is not known whether these were more than broadly accurate statements of the law of the fourteenth century, but they do seem to show the extended meaning which some at least tried to give to the 1318 statute in that period.

79. Aberdeen Registrum i 155; Moray Registrum, 379. The register entries may be connected. Professor Stein has argued that the author of the passage in the Aberdeen register was William de Spynie. In 1397 William became bishop of Moray and he supervised the compilation of the Moray register: 'Roman law in Scotland', Ius Romanum Medii Aevi, pars V, 13b (Milan, 1968) 37 - 9.

80. Moray Registrum no. 179.

81. Moray Registrum no. 153.

(ii) Pleable brieves

Modern legal historians⁸² have not dealt in any detail with the meaning of the phrase 'pleable brieve' which appears as a technical term in Scottish legal sources from the end of the thirteenth until the beginning of the sixteenth century. Sheriff McKechnie spoke only of the 'so-called pleable brieves';⁸³ Professor Harding has observed that they were the equivalent of the 'original writs' in England.⁸⁴ Professor Willock, following the institutional writers Stair and Erskine, distinguishes two categories of brieves: those which were 'retourable' and those which were 'non-retourable' and continues:⁸⁵

These classes of brieve are also distinguished as non-pleable and pleable respectively, the exception being that in the normal case the verdict to be retoured would simply establish a question of fact which would not be contested and so would not require to be pleaded before a judge, whereas the pleable brieve was in its nature contentious, arising as it did from a dispute between two parties.

This equation of pleable and non-retourable brieves first occurs in Stair's Institutions.⁸⁶ By the time of Stair, the non-retourable

82. The topic was briefly discussed by M. Napier, "The Lanox of Auld": An Epistolary Review of "The Lennox", by William Fraser (Edinburgh, 1880) 28. His account seems to be derived from the misleading ones of Skene, Stair and Erskine.

83. McKechnie, 'Brieves', 6.

84. Harding, 'Medieval brieves of protection', 126.

85. Willock, Jury in Scotland, 106.

86. Stair, Institutions IV, iii, 10 and 17; cf. Erskine, Institute IV, i, 3.

briefes were four in number. They were the briefes of perambulation, lining, terce and division, although Stair notes that the briefes of right and 'disseasing' had also been pleadable before they fell into desuetude. Stair also states two distinctions between pleadable and retourable briefes. First, with the former there was no retour to the chancery of the result of the judicial process which it had commanded and ordained. Second, while with the retourable briefes there was only a general summons proclaimed at the market cross, calling any person wishing to state an interest in the case, in the pleadable briefes a particular person was named and called upon to defend the action. Something of this latter point may underlie the definition of pleadable briefes offered by Skene:⁸⁷

Breves pleadable, breve placitable, are all sik briefes quhilks are persewed and defended be ane ordinar form of proces before ane competent judge at the instance of ane persewar against ane defender.

Nevertheless we cannot follow Stair's account of pleadable briefes unquestioningly into the centuries before 1500, for when his list of such briefes is compared with those from the earlier period, it will be seen that there is no overlap. In Regiam Majestatem there is a chapter 'De his quae placitantur per brevia', which lists the briefes of right, de nativis, mortancestor, novel dissasine and distress.⁸⁸ Since there is no equivalent passage in Glanvill, this may well reflect Scottish practice at the time the passage was written, probably early in the fourteenth century. In Quoniam Attachiamenta there is another, slightly longer, list of briefes

87. Skene, De Verborum Significatione, s.v. 'Breves pleadable'.

88. Regiam Majestatem I, 4.

'communiter currentibus que sunt placitabilia'. This includes all those mentioned in Regiam while adding the brieves of convention, de liberando hominem de plegiagio, de proteccione regis infricta and warrandice.⁸⁹ Given the prominence of Regiam and Quoniam, it is impossible to avoid reading some significance into the fact that neither includes Stair's pleadable brieves - perambulation, lining, terce and division - in its list.

Examination of other medieval references to pleadable brieves reveals further points mentioned by neither Stair nor Skene. The first of these is in the short treatise known as 'The Scottish King's Household' which was probably written in the 1290s. It states that 'no writ [is to] be issued out of the chancery except the writs of course and pleadable, without the special command of the king's privy seal'.⁹⁰ Brieves were issued under the great seal, which was usually brought into operation by letters of instruction from the king under his privy seal. This particular passage seems to have been accepted as authentic evidence of the practice of the late-thirteenth century practice of the capella regis: it seems therefore that the forms of some pleadable brieves were already settled so that it was possible to speak of them as de cursu. They were not issued of the king's grace as evidenced in his privy seal letters, but in the ordinary course of the chapel on payment of the appropriate fee.⁹¹

89. Quoniam Attachiamenta ch. 33.

90. SHS Misc. ii 31 - 2.

91. For the foregoing see Thomson, Public Records, 62 - 8; Duncan, 'Acta of Robert I', 7; RRS vi 19, 25 and 28; Chalmers, 'King's council', 33. For the contrast between letters issued de gratia and de cursu see Stevenson, Documents i 169, Stones and Simpson, Edward I ii 97 and RRS vi no. 306.

The pleadable breve emerges as the first step in a contested court action in the statutory provision of 1318 being considered in this chapter. The defender is not to be ejected from his freehold without the king's pleadable breve and he is to be given reasonable notice to answer for his tenement at a specific time and place.⁹² But three later statutory references, two in 1471 and one in 1504, are rather more illuminating. In May of the former year parliament passed an act 'for the eschewyn of maneswering of false inquestis and assisis.... saffand and excepan the assises of breves pledabile quhilk this statute sal nocht extend apoun'.⁹³ The act was particularly aimed at juries serving upon retourable breves of inquest.⁹⁴ It seems therefore that there was some distinction drawn between retourable and pleadable breves. At the next parliament, held in August, another act was passed, this time relating to the situation 'quhen any brevis pledable hapnis to be folowit before quhatsumever juge, and thir be excepciouns ane or ma proponit and thiruppoun borowis and recounters fundin and dome gevin and falsit and again said be outhir of the partis and thirefter discussit in the parliament'.⁹⁵ In 1504 parliament again dealt with 'proces in all manner of dumys falsing', the mischief being the 'grete abusioune of justice and gret expense to the partis persewand thir land and heretage be the breve of rycht and other brevis pledabill

92. APS i 473, c. 25.

93. APS ii 100, c. 9.

94. Willock, Jury in Scotland, 235.

95. APS ii 101.

be proponing of exceptiouns frivole and borghis and recounteris and falsing of dumys thro presumyng of delais'.⁹⁶ Both these acts show clearly a link between pleadable briefes, the appeal procedure of 'falsing the doom' and the forms of pleading in court.

To understand this last it is necessary briefly to examine two statutes of 1430 which refer to these forms in some detail. They show that a party making an 'exception' or 'weir of law' had to find a borgh or security to support his claim. The other litigant might 'recounter' or reply to the exception with reasons, having taken advice within or without the court before giving his answer. Upon this debate the court would then give a doom.⁹⁷ This clarifies the terminology used in the acts of 1471 and 1504 somewhat. An action was raised by pleadable brieve; the defender proponed exceptions, one or more, and found security to back them up; the pursuer had to reply; the court then gave a doom on the debate; and the doom was subject to falsing.

This process can be followed in the case which gave rise to the act of August 1471.⁹⁸ At the previous parliament in May, Andrew Bisset sought to false a doom which had been given in the justice ayre of Cupar upon a 'brief of mortancestry'. The auditors of falsed dooms referred the question to the next parliament because they could 'nocht now be avisit be the lawys that thai find written

96. APS ii 254, c. 41.

97. APS ii 18, cc. 5 and 7.

98. For what follows see ADA, 12; APS ii 101, 117; ADA, 66.

to declare quhat order and proces salbe had in the proceeding of the said brief'. The act was the response of the August parliament, its order and form 'to be observit and kepit in al pointis in the proceeding of the brief of mortancestrie purchest be Andro Bissate agane the lord of Ardros and now dependand in the justice are of Couper', as well as 'quhen any brevis pledable hapnis to be folowit before quhatsumever juge'. Where the judgment upon a defender's exception was finally falsed in the pursuer's favour, that was not to conclude the whole action in his favour; the parties should, rather, return to the justice-ayre and take it up once more. As the act put it, 'thai sal pas ordourly furthwart fra excepcioun to excepcioun how oft that ever the dome be falsit on to the time that the brief be brocht to the recognicioun of an assize'. It is not altogether clear what immediate effect this had upon Bisset's action but in June 1478 he again falsed 'the dome given in the justice are of Coupir' before parliament. The auditors decreed that the doom

for the bourgh fundin be Alexander Spens
advocate and forspekare for Johne Dishintoun
of Ardross upoun thre breve of morthancestre
purchest be Andreu Biset upoun the landis of
Kinbrachmont and agane a recontre maide be
William Richartsoun advocate and forspekare
for the said Androu wes evil gevin and wele
agane sayd.

Here then is a perfect example of the model of pleading which was derived earlier from the various other fifteenth century statutes. Moreover the case proceeded upon a breve of mortancestor, one of those listed as pleadable by both Regiam and Quoniam. The defender excepts with a borgh, the pursuer recounters and the doom then given in the defender's favour is subsequently falsed. There is an interesting comparison with another case involving a breve

of mortancestor in 1390. The document which records it explains that the brieve had been led before the justiciar twice previously and the dooms given then had both been falsed in parliament. On this occasion however, it is put to an assize of the best and worthiest of the country who return a verdict on the questions in the brieve, whether the pursuer's ancestor died vest and saised of certain lands, whether the pursuer is his nearest heir and whether the defender is now holding the lands.⁹⁹ The best explanation of the procedural history of the case is surely that the two earlier dooms had been given on exceptions proposed by the defender, but that their falsing, by whichever party, had been in favour of the pursuer and that accordingly the question in the brieve could now be put to the assize.

This brings us to the next point which is apparent from this evidence, namely, that the pleading of an exception prevented the brieve being put to the assize. The act of 1471 shows that bringing the brieve to the recognition of an assize was the conclusion of pleading, while in the 1390 case the action went to the assize only after the exceptions had been pleaded and the dooms thereon falsed. Another case, from 1368, brings out the point even more clearly. John son of Walter sued Thomas Scot, tenant of John Lindsay, by brieve de proteccione regis infricta in the justiciar's court at Lanark. The brieve was one of those listed as pleadable in Quoniam. The alleged infringement of the king's protection consisted in turning out cattle on the pursuer's pastures and deforcing his sergeant. Damages of forty pounds were sought. Scot began by denying breach

99. Spalding Misc. ii 319.

of the king's protection and the amount of damages claimed, then sought advice outwith the court. Having re-entered the court, he repeated his denial. Then Lindsay, Scot's lord, acting as prelocutor for his tenant, claimed that the pasture pertained to him as his fee and heritage and that Scot ought not to answer concerning his lord's fee and heritage upon a brieve of protection. The court refused to put this exception to proof and decreed that Scot ought immediately to undergo an assize upon the principal action since he had denied the claim 'simpliciter et plane'. But this was overturned by parliament, which found that Scot's exception had been pleaded in time to prevent the claim being put to the assize.¹⁰⁰ Similarly in 1505, council reduced the doom given for the pursuer on a brieve of right (again, a pleadable brieve) because the sheriff-depute had put it to the knowledge of an assize 'the borcht and recounter proposit of before [by the defender] nocht discussit by warde and dume'.¹⁰¹ Finally we may also note a case of 1465, in which the defender's warrantor failed to compear; the pursuer argued successfully that the defender 'had renuncit his rycht and put it til ane othir, and for that reson, sen [warrantice] was the last excepcioun, thair acht na plede borowis na recountir to be herd, bot the justices suld ger the breffe procede to the recognicioun of ane assise'.¹⁰²

An exception is, then, a reason put forward by a defender for not giving judgment on the pursuer's claim. It is at this point

100. APS i 505.

101. SRO, Acta Dominorum Concilii, CS 5/16, ff. 144 v. - 145 r. (Appendix C).

102. SRO, Lord Advocate's Department, AD 1/60 (Appendix D).

in the argument that attention must shift from Scottish to European legal development in the medieval period. It is clear that we are examining a form of pleading highly characteristic of developed medieval law throughout western Europe, which owed much to the 'rediscovery' of Roman law in the renaissance of the twelfth century and which represented a shift from the simple procedure whereby one party made a claim against another in set words, the defender uttered a formal denial, and the court then determined which of them should have the burden of proof and what form the proof should take: battle, compurgation or some kind of ordeal. The development of pleading was the result of the idea that the defender could add to his denial, introducing new matter to put the pursuer's claim in a different light. Its evolution was intimately connected with the study of rhetoric which in the twelfth century was 'characterised by sympathy for legal problems'. The pursuit of probable truth, it was perceived, might be eased through the technique of disputation between parties. Until one party merely denied the truth of another's statement, there was no need for a judgment, at least so long as the statements made continued to be relevant to the case. 'A conflict of views represented an effective means of discovering the truth'. The procedure of the church courts was, as has been shown, based on these theories of contemporary logicians.¹⁰³ To describe what the defender did in commencing the disputation, the word 'exception' was borrowed from Roman texts by the canonists and a great body of learning, to be

103. A. Giuliani, 'The influence of rhetoric on the law of evidence and pleading', JR 7 (1962) 216 - 251 (quotations at pp. 229, 233).

found in works such as the Ordo of Tancred and the Speculum Judiciale of Durandus, came to be built upon it. For our purposes, it is important to note that the purpose of the pleading was to reach the true difference between the parties, the stage of litiscontestatio at which the dispute was submitted for judgment. The canonists also distinguished broadly between three types of exception, the declinatory against the competence of the judge or the jurisdiction of the court, the dilatory against the formal competence of the way in which the action had been raised and, lastly, the peremptory which, if made out, would wholly defeat the pursuer's case. To such exceptions there might be replies or replications from the pursuer, which again could be of various types falling within the three basic categories. Thus it might be that the exception was in effect a new claim upon which the action would proceed thereafter.¹⁰⁴

This learning made its impact upon the procedure of secular courts throughout Europe, including England as is evident from the pages of Bracton.¹⁰⁵ English legal historians have related the development to the emergence of the jury as a mode of proof supplanting the judicium Dei, battle, or oath, or ordeal. Fallible human beings could not always give the correct answer so long as the lawsuit consisted merely of a formal claim in set

104. For the foregoing see Ollivant, Court of the Official, 108 - 113, and Select Cases from the Ecclesiastical Courts of the Province of Canterbury c. 1200 - 1301 edd. N. Adams and C. Donahue (Selden Soc., vol. 95) introduction, 41 - 3.

105. Pollock and Maitland, History of English Law ii 611 - 16; Bracton ff. 399 b (iv 245) and 400 - 400 b (iv 247).

words met by a denial. Everything in the claim might be true and yet the defendant might still be in the right because not all the relevant facts had been brought out. Accordingly it was necessary to allow the defendant to introduce the additional material before the jury and not to confine him to his denial.¹⁰⁶ From this process applied to the developing writ system a body of substantive law began to emerge:¹⁰⁷

We begin to see that the assize-formulas contain words which are rapidly acquiring a technical import, such as 'disseised', 'free tenement', 'as of fee' and so forth. A defendant may well fear that, with such phrases before them, the jurors, though they ought to answer the question in his favour, will give his adversary a verdict. The defendant, for example, has ejected a tenant in villeinage, who forthwith brings the Novel Disseisin against him. The jurors ought to say that the plaintiff has not been disseised from a 'free tenement'. But will they do so, unless their attention is specially directed to the villein character of the tenure? So we allow the defendant to raise this point; we allow him to do so by way of an assertion that the assize should not proceed; this assertion we call an exceptio.

Maitland goes on after this passage in the History of English Law to speak of 'the utmost laxity' in thirteenth century pleading, of 'the pleaders' many faults which would have shocked their successors'.¹⁰⁸ Later, English pleading developed its own strict

106. S.F.C. Milsom, 'Law and fact in legal development', University of Toronto Law Journal 17 (1967) 1 - 19 at 15 - 16; also his Historical Foundations, 42 - 4.

107. Pollock and Maitland, History of English Law ii 613.

108. Pollock and Maitland, History of English Law ii 614 - 5.

rules and terminology, but as has often been recognised it did not lose its basic foundation in the principles of medieval logic.¹⁰⁹ The purpose of pleading remained the finding of an issue between the parties - a proposition on the one side denied on the other - which could be put to a jury for answer. As Dr. Baker remarks, 'the logic was beautifully simple'.¹¹⁰ The plaintiff made his claim, or count. The defendant might deny the whole, a general traverse, in which case there was a general issue for the jury. Alternatively he might deny one only of the plaintiff's facts, a special traverse producing only a special issue for the jury. Lastly the defendant might 'confess and avoid', that is, confess the truth of all that the plaintiff had said, but allege a new material fact which meant that no wrong had been committed. Here there was no issue, because an affirmative, the count, had not been met by a denial. Hence the plaintiff was required to reply and from his reply an issue might emerge. Only when an affirmative was met by a negative was judgment required.¹¹¹

Such pleadings were known in thirteenth-century England as peremptory exceptions, showing the extent of the influence of Romano-canonical procedure at this period.¹¹² (Later, as English

109. Giuliani, 'Influence of rhetoric', 242 - 8; Spelman's Reports ed. J.H. Baker (Selden Soc., vols. 93, 94) ii 143 - 4.

110. Baker, Introduction to English Legal History, 68.

111. Spelman's Reports ii 144 - 150.

112. Pollock and Maitland, History of English Law ii 614; Baker, Introduction to English Legal History, 67.

procedure developed its own terminology, they became known as 'special pleas in bar'.¹¹³ Moreover there were also exceptions which Bracton described as dilatory, reasons for refusing to answer the plaintiff's claim at all. Bracton's account of these exceptions, and the order in which they must be propounded, was clearly drawn straight from the procedure of the church courts,¹¹⁴ but as Maitland pointed out, in doing this Bracton was merely providing a 'new rubric' for old rules.¹¹⁵ Such exceptions might be to the competence of the court or to the judge or to the form of the writ or of the plaintiff's counts, and they had to be proposed in an order which was identical to that laid down in the canon law.

The subject of pleading in early Scots law has only been examined by one scholar, Sir Philip Hamilton-Grierson, in the introduction to his edition of Habakkuk Bisset's early seventeenth century Rolmentis of Court.¹¹⁶ The evidence examined by him suggested the model of a formal statement of claim followed by a denial, after which the court would adjudge the form of proof to be taken. But it was possible to plead exceptions such as in England. The matter is discussed in relation to brieves in both Regiam and Quoniam. There may be exceptions to the breve itself, such as its lack of due form or its wrong description of the lands subject to dispute; there may be exceptions against the form of

113. Pollock and Maitland, History of English Law ii 614.

114. Bracton ff. 399 - 438 (iv 245 - 362).

115. Pollock and Maitland, History of English Law ii 614.

116. (Scottish Text Society, 3 vols., 1920 - 26) iii 62 - 70.

the pursuer's statement of claim. An exception, it appears from Quoniam, is some good reason why the matter should not be put before the assize. But in both texts the discussion appears to be confined to exceptions which, in the language of canonists and thirteenth century English law, would have been described as dilatory - that is, objections to the form in which the action was brought, rather than to its substance.¹¹⁷

It is also exceptions of this type with which chapters 14 to 16 of the 1318 legislation deal, laying down the minimum content of a statement of claim (narracio) in cases relating to contracts, debts, caption of goods and 'all actions of wrong, great or small'. So long as the pursuer recites these minimum elements, his statement cannot be challenged or quashed.¹¹⁸ Dilatory exceptions to briefes were dealt with again in 1430, when parliament ordained that, so long as the brief was in 'the forme..... statute in the law of before' and 'nocht rasit na blobit in suspect placis', exceptions against it were to be of no avail. The act lists the 'suspect placis' where erasures and blots could still give rise to exceptions - the names of the parties or the lands, the cause upon which the brief had been purchased, or its date.¹¹⁹ It is one of a series of statutes designed, inter alia, 'til exclude frivolus and fraudulent excepciounis',¹²⁰ possibly enacted as a result of the deliberations

117. See Regiam Majestatem I, 10 and 11; Quoniam Attachamenta ch. 35.

118. APS i 470 - 1, cc. 14 - 16.

119. APS ii 17, c. 3.

120. APS ii 17 - 18, cc. 1 - 7.

of a group which in 1426 had been appointed to 'mend the lawis that nedis mendment'.¹²¹ The statute by which they were appointed had also laid down that 'all lauchful excepciounis of law be admittit in jugement and all frivolus and fraudfull excepciounis be repellit and nocht admittit be the jugeis swa that the causis litigious and pleyis be nocht wrangwisly prolongyt'. It must be doubted whether the act of 1430 would 'mend' this particular mischief, since it left considerable scope for the recalcitrant defender to attack the formal correctness of the brieve.

In none of these sources is there any reference to the term 'dilatory' as a description of a category of exceptions, nor is there any use of the other technical adjective 'peremptory'. However this classification of exceptions as either dilatory or peremptory was used in Scotland, as can be seen from the late fifteenth century records of the auditors of parliament and lords of council.¹²² The contrast between the dilatory and the peremptory exception is also drawn in the first chapter of a short treatise, De Exceptionibus, which can be found in some of the legal manuscripts which circulated in Scotland before 1500. There a dilatory exception is described as something which delays the plea (placitum) while a peremptory exception is a statement against another in a legal process (in agendo) whereby he may be excluded from his action.¹²³

121. APS ii 10, c. 10. But cf. Duncan, 'James I', 4.

122. See ADA, 198, and ADC (Stair) iii 32, 34, 96 (also introduction, lvii).

123. See Appendix E.

If we turn to the case of John son of Walter against Thomas Scot on a brieve de proteccione regis infricta which was discussed earlier, then we can find an example of a peremptory exception being pleaded which in the terminology of later English law would have been called a confession and avoidance. The defender admits the pursuer's facts, but seeks to add one of his own which casts a different light on the matter.¹²⁴ Similarly the procedure of pleading which can be derived from the statutes and cases of the fifteenth century examined above fits the model whereby the parties in debate define the issue which is to be put to the jury for verdict by a sequence of affirmations of fact until there is a denial. With each affirmation a borgh will be given, for 'he who excepts must offer to prove his exception',¹²⁵ i.e. the fact upon which he relies. Finally, one of the parties enters a denial, pledges are given and the issue is put to a jury for proof.

It may therefore be concluded that 'pleading' was a term with some substantive and specific content in medieval Scotland, a content of a nature very similar to that apparent in thirteenth-century England. The English model was of course heavily influenced by Romano-canonical procedure and no doubt this was also true of Scottish pleading; but given that in Scotland the issue was put to a jury rather than to a judge it seems likely that England provided the more direct influence in giving Scottish pleading its form.

The connection with the pleadable brieves is apparent. If pleading was a debate between two parties about the facts of a

124. APS i 505.

125. Pollock and Maitland, History of English Law ii 616.

case in which they defined the dispute which the jury had to determine, then such a procedure could only take place upon a brieve if it set out in general terms some dispute between two parties and invited the court to decide it. The brieve of inquest was not such a brieve. It commanded the sheriff to carry out an inquisitorial function, to gather evidence on certain questions, draw conclusions with the assistance of a jury and report. The matter for decision on a brieve of inquest could not be narrowed down by oral pleading between parties: a retour which failed to answer all the points of the brieve would be invalid. The brieve determined what matters had to be proved. The same was true of the brieve of tutory, where the question to be answered was the identity of the nearest male relative over twenty-five years of age of a named individual and the brieve of idiotry, where various questions about a person's mental state and nearest male relatives had to be answered. No doubt there were disputes and debates over these matters before the court, but they did not affect the questions which were ultimately to be put to the jury: they were simply part of the material which would be considered in formulating answers for the retour.¹²⁶

The question of the brieves Stair called pleadable is a little more difficult, yet it is apparent that, if our linking of the description 'pleadable' with the procedure of pleading is correct, Stair's discussion is mis-conceived. Perambulation, lining, division and kenning to terce were all essentially procedures for

126. Willock, Jury in Scotland, 119 - 121.

declaring the boundaries of lands: in the first two instances, those between neighbouring proprietors, in the latter, between parties entitled to different parts of a greater whole. The declaration of the boundaries in each case involved physical acts of demarcation by the court, as has been explained by Professor Willock, and it was essentially this physical act which the brieves ordained should take place.¹²⁷ Thus in the brieves of perambulation and lining, the officer was to cause the boundaries to be walked out and marked by the court, while in the brieves of division and terce the officer was to split the property between the parties so that each received an equitable share of the sunny and shadowy portions of the land. The evidence gathered by Professor Willock shows that considerable labour might be called for from the members of the court involved in a case under one of these brieves.¹²⁸ But in none of these cases was the court called upon to give a doom. The act of demarcation and the giving of sasine, if required, was the end of procedure on the brieve, and could not be narrowed down by pleading between the parties. True, there might be arguments and evidence led in court, but these do not appear to have been intended in any way to restrict the verdict of the court as expressed in the eventual demarcation by the good and faithful men of the country.¹²⁹

It is true that statutes of 1504 refer to 'the exceptioun oftymes proponit aganis wedowis persewand and followand thir brevis of

127. Willock, Jury in Scotland, 122 - 132.

128. Willock, Jury in Scotland, 127 - 8.

129. Willock, Jury in Scotland, 126 - 7.

terce',¹³⁰ and to exceptions against the brieve of inquest,¹³¹ language suggestive of pleading. But in the case of terce the 'exception' in question was that the widow had not been married to the deceased man from whose lands terce was claimed, a question which the sheriff was in any case commanded to explore by the brieve. In much the same way, in the brieve of inquest he had to find out if its bearer was the nearest and lawful heir of the deceased, so that the exception of bastardy mentioned in the 1504 statutes was in any event a question raised by the brieve. It was in other words a matter on which evidence would be heard, but not pleading.

There are further indications that the brieve of terce was not pleadable in the several occasions upon which an assize which had served a brieve of terce was sued before the lords auditors or lords of council by summons of error, a procedure which by act of parliament was not to be used against assizes serving on pleadable brieves.¹³² Further the act of 1504 on falsing the doom implies that the only pleadable brieve addressed to the sheriff court in use at that time was the brieve of right. Both division and terce pertained to the sheriff and continued in frequent use for several centuries after 1504.¹³³

It may be concluded therefore that the brieves of perambulation, lining, terce and division were not pleadable in the sense in which

130. APS ii 252, c. 22.

131. APS ii 253, c. 40.

132. E.g., ADA, 48 - 9, 54, 59, 124*; ADC i *97.

133. APS ii 254, c. 41; Balfour, Practicks ii 649 - 50.

that description was used up to the beginning of the sixteenth century, and are rightly excluded from the lists in Regiam and Quoniam. It has never been suggested that retourable briefes were pleadable, but it is interesting and revealing to consider yet another statute of 1504 in which it was narrated that 'thir has bene in tyme bigane gret abusioun in the proponing of exceptiouns frivole again the breif of inqueste and pervertit the ordour and natour of it as it war ane breve of pley'. The statute went on to allow certain dilatory exceptions against the summons, the judge and the inquest to be pleaded.¹³⁴ Most of these can be seen as allowable before 1504, in cases of error or wrongful and partial proceedings against the inquest.¹³⁵ Although evidence is lacking, it is difficult to believe that dilatory pleas were not available against all briefes, retourable, non-retourable or pleadable. But it is most unlikely that mistakes in the drafting of the briefe or departures from due form would have been allowed to pass if challenged in court. What therefore would have been the distinctive features of the pleadable briefe would be the making of peremptory exceptions of fact, the creation thereby of an issue and the rendering by the court of a doom thereon. It followed, equally, that falsing the doom was the appropriate appeal procedure, and this explains why pleadable briefes were excluded from the act enabling actions of error against juries.

134. APS ii 253, c. 40.

135. See e.g. Fraser, Lennox ii no. 72 where in c. 1476 dilatory exceptions against the judge, court, briefe, day, place, petition and the points of the briefe were proposed against a briefe of inquest; also ADA, 14, 19, 44, 74; ADC i 10, 212, 223, 243.

Three last points on procedure and pleading. The first is to note that the defender almost always had to begin his pleading with a general denial of the pursuer's claim. Regiam, apparently embodying the provisions of chapter 19 of the 1318 legislation, states that in the brieves of right, mortancestor and novel dissasine he must make a denial immediately but that he can then take advice (in the act, furth of court) before putting forward more specific defences.¹³⁶ There are similar statements about the need to start with a general denial in the brieves of right and dissasine and also in the breve of distress, in Quoniam.¹³⁷ The case of John son of Walter against Thomas Scot shows the apparently general applicability of the rule. The defender started with a denial of the pursuer's claim under a breve de proteccione regis infricta, then having taken advice outwith the court, sought to plead an exception. The court refused to allow him to plead, on the grounds presumably that he had taken up the general issue of the pursuer's claim, but parliament ruled that his exception should be heard.¹³⁸ The court's difficulty here illustrates the slowness of the process by which the ability to plead was grafted onto the older forms of lawsuit. As Maitland remarked in characteristic fashion, 'a downright No has been in the past the one possible answer; it is still the indispensable preliminary to every possible answer'.¹³⁹ We can see a sort of mid-way stage being reached in trespass cases when we consider the provisions of chapter 17

136. Regiam Majestatem I, 10; APS i 471, c. 19.

137. Quoniam Attachamenta chs. 34, 36 and 40.

138. APS i 505.

139. Pollock and Maitland, History of English Law ii 609.

of the 1318 legislation. The act states that so long as the defender denies ^e 'torth et noun raysoun quod dicitur wrang et unlaw' and the amount of damages claimed by the pursuer, he is to be regarded as having entered a defence.¹⁴⁰ In other words, he does not have to state his entire defence immediately. Thus the law has moved beyond the point where the defender is only allowed to deny generally and is moving to the position where his general denial is only the formal opening of his pleading. Chapters 18 and 19 show why these provisions were enacted: the former requires the pursuer to state his case fully before the defender need reply, the latter applies this principle to cases begun by briefs of right, mortancestor and novel dissasine.¹⁴¹ The defender is not to be taken by surprise and forced immediately to an issue on a statement of claim whose form, apart from some minimum content, is ceasing to be predictable.

The second and third of our final points may be briefly stated. First, pleading was not confined to actions begun by brief. To speak of pleadable briefs distinguished them only from other briefs. Pleading was a method of restricting the role of proof in the new juridical world where judgment was given by men and not by God. Actions by pursuers against defenders were not all begun by brief - as the rule insisting on briefs in cases of freehold itself makes plain. Wherever there was an action, pleading was a vital part of court procedure.¹⁴² Lastly, it must be noted that there

140. APS i 471, c. 17.

141. APS i 471, cc. 18 and 19.

142. Apart from references already given see e.g. Fife Court Bk., 315 - 316; APS i 504, ADA, index, 'Dilator defences or exceptions' and 'Exceptions', ADC i, index, 'Dilatory exceptions', ADC ii, index, 'Process', ADC (Stair) iii, index, 'Exceptions dilatour'.

appears to be no Scottish term equivalent to the English demurrer, whereby the defendant answered the pursuer by stating that his claim as it stood gave rise to no legal remedy and thereby posed a question of law which it was for the judge rather than the jury to answer.¹⁴³ The absence of evidence on the possibility or otherwise of such a plea is of course not conclusive against a background of almost total lack of material on the subject of pleading as a whole. The treatise De Exceptionibus speaks of exceptions de jure as reasons or arguments advanced in a dispute perceived to be sufficient, yet the proposer may resort to another answer. Perhaps this is a hint of the demurrer but it is not a very clear one. Exceptions de jure are also distinguished from exceptions of fact, by which both parties descend from the first proposition and after answering the proposer may not resort to another answer.¹⁴⁴ It may be noted that in England demurrers were often pleaded tentatively, to test the reaction of the court, but could be withdrawn. In pleading properly speaking however, once a party had advanced an exception the admissions it contained were conclusive and could not be withdrawn. This after all was the purpose of the procedure, to get at what the parties admitted to be true and narrow the scope of the proof. De Exceptionibus seems to be attempting to articulate the distinction between pleading a demurrer and pleading an exception of fact. In view of the uncertain status of the treatise as an account of Scots law, too much weight should not be given to the evidence it contains; but it would be altogether remarkable if pleas of the nature of demurrers

143. Baker, Introduction to English Legal History, 69 - 70.

144. See Appendix E.

were unknown in the Scottish secular courts of the period.¹⁴⁵

An example of such a plea may in fact be found in a case of 1465 where the defender's warrantor failed to turn up when called and the defender took a plea in law that since the warrantor was a minor the case ought to be sisted until he came of age.¹⁴⁶

Our final question in this chapter must therefore be, to which of the pleadable briefes listed in Regiam and Quoniam would a pursuer seeking recovery of lands from another have been compelled by the act of 1318 to have recourse? Only three of those briefes appear to concern disputes over lands, namely, dissasine, mortancestor and right. All the rest are connected with the enforcement of personal rather than real rights.¹⁴⁷ Accordingly in the next chapter the briefes of dissasine, mortancestor and right will be discussed in some detail.

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145. Ollivant, Court of the Official, 112 mentions that litiscontestation might take place in the official's court on pleas called 'jura' (i.e. of law?).
146. SRO, Lord Advocate's Department, AD 1/60 (Appendix D, where the legal issues are set out in full).
147. For examples of the use of the briefes de compulsione see Morton Registrum ii no. 130, Kelso Liber ii no. 397; Aberdeen Burgh Recs., 133, 232, 237; Fraser, Wemyss ii no. 49; Fraser, Melville iii no. 41; RMS ii no. 375. They cease to appear after c. 1450. The last example of the brieve de nativis is Moray Registrum no. 143 (1364). The brieve de proteccione regis infricta was the only one of the personal briefes pleadable before the justiciar (Quoniam Attachiamenta ch. 37; APS i 505) and may have been made obsolete by statute in 1430: APS ii 22, c. 1 (see also W.C. Dickinson, 'The acts of the parliament at Perth 6 March 1429/30', SHR 29 (1950) 1 - 12 at 5 - 9 and Harding, 'Medieval briefes of protection', 138).

Chapter Four

Dissasine, Mortancestor and Right

(a) Introduction

There has been relatively little study of procedure by brieve in medieval Scottish courts by comparison with the wealth of literature on the equivalent English procedure by original writ. Forty years ago, Lord Cooper pointed out that a formulary system of procedure had come into operation in Scotland whereby court actions were begun by writs in the name of the king, commanding the judge to determine an issue set out in the document. Such documents were known in the vernacular as 'brieves', a word derived from their Latin name of 'brevia'. It was Lord Cooper's belief that, after this system had 'attained its culminating point in the early fourteenth century', it 'fell into decay' and had, with some exceptions, disappeared by the middle of the fifteenth century.¹ The exceptions were, of course, the 'classical' brieves discussed in Stair's Institutions at the end of the seventeenth century - perambulation, succession, terce, division, lining in burghs, tutory and idiotry.² After the death of Lord Cooper, Sheriff McKechnie demonstrated that the theory of a declining system in the late medieval period was mistaken. In a careful study of a wide range of material, he sought the first appearance of each form of brieve and was able from this to show that the system was apparently still expanding in the fourteenth century and reached what he called its 'heyday' in the fifteenth. He also drew attention to the continuous history of the brieve of

1. Reg. Brieves, 30. See also Cooper, Selected Papers, 228.

2. Stair, Institutions, IV, iii, 4 - 14.

right throughout this period.³ Since McKechnie's paper was published, there have been further detailed studies of particular forms of briefe, notably Professor Harding's essay comparing the briefe de proteccione regis infricta with the English writs of trespass.⁴ Attention must also be paid to the illuminating work of Professor Barrow on twelfth century developments⁵ and to Professor Willock's careful researches on the 'classical seven' in the medieval period.⁶ However, there remain many gaps in our knowledge, in particular in relation to the briefes of dissasine, mortancestor and right which, as the previous chapter has sought to show, were the ones to be used by litigants in cases touching freehold.

As already mentioned, Sheriff McKechnie demonstrated the continuous existence and use of the briefe of right up to the beginning of the sixteenth century. But there would appear to have been no serious dissent from Lord Cooper's conclusions on the subject of the briefes of dissasine and mortancestor. He recognised their existence in the thirteenth century but, in line with his general thesis, seems to have thought that dissasine fell into desuetude in the fourteenth and fifteenth centuries. Certainly he never carried its history beyond the legislation touching the matter in 1318 in any of his published works.⁷ Professor Walker has since

3. See McKechnie, 'Briefes', passim. Cooper acknowledged McKechnie's correction before its publication and his own death: Selected Papers, 222 n. 3.

4. Harding, 'Medieval briefes of protection', passim.

5. See RRS i 59 - 68 and RRS ii 69 - 75.

6. Willock, Jury in Scotland, 105 - 139.

7. See Reg. Briefes, 15 - 16; Selected Papers, 90 - 91; 'Freehold in Scots law', JR 57 (1945) 1 - 5; and the editions of Regiam and Quoniam, 243 and 350, where he states that 'the latest reported case of Novel Dissasine which has been noted is Forman v. Ker (1469) 1 Br. Supp. 112'. The case referred to is however plainly not one of dissasine, novel or otherwise.

noted a case of dissasine in 1368 and stated that 'it would appear accordingly that novel dissasine fell largely into desuetude round about 1400',⁸ while Professor Willock states that this occurred 'probably in the mid-fourteenth century'.⁹ If Lord Cooper's view of dissasine is somewhat unclear, his thoughts on mortancestor are more easily seen, when he writes:¹⁰

[T]he emphasis appears to have shifted from ejecting the intruder to declaring the title of the heir to succeed. Indeed the term "mortancestor", which is of very frequent occurrence in Scottish charter records of the thirteenth century, was more commonly used not of the original possessory remedy but of the comprehensive generalis inquisicio ... which became the "brieve of succession" of Balfour ... and the "brieve of service" of Stair ... and of later practice down to 1847 - the substance of all these being practically identical ... concerned solely with the investigation of the heir's title, and there being no intruder to eject. From all this it would seem to follow that by the end of the thirteenth century the original brieve of mortancestor was losing its identity.

Again, a broadly similar conclusion has been reached by subsequent writers, such as Professor Willock:¹¹

The brieve of mortancestor died out at an early date, being, in common with novel dissasine, replaced by such native actions as ejection and wrongous occupation, but the name had so impressed itself on the legal imagination that it became attached to the related brieve of inquest.

However the extent to which Lord Cooper's general thesis was undermined by Sheriff McKechnie suggests that his particular conclusions on the subject of dissasine and mortancestor should be examined afresh, while McKechnie's own sketchy discussion of the brieve of right is also capable of further elaboration. In this chapter the evidence to be found in the sources suggested by the learned Sheriff -

8. D.M. Walker, 'The development of reparation', JR 64 (1952) 101 - 134 at 111. Walker otherwise reproduces the views of Cooper on dissasine. For the 1368 case see APS i 505.

9. Willock, Jury in Scotland, 132.

10. Reg. Brieves, 14.

11. Willock, Jury in Scotland, 108.

ecclesiastical cartularies, collections of family papers and so on - will be brought together with legislation and legal literature of the period. We are driven to these sources by the unfortunate lack of medieval court records, but enough can be gleaned from them and an occasional comparative glance south of the border to enable us to sketch a rather different picture from that just described.

(b) The brieve of dissasine

The earliest reference to a remedy for dissasine in the Scottish royal courts seems to be in a statute of 1230 which has generally been accepted as authentic.¹² It is also generally agreed that the enactment laying down that brieves of novel dissasine and mortancestor are always to be determined by an assize cannot possibly be legislation of David I (1124 - 1153) or any other twelfth century king, accurate though its statement of the law is.¹³ There is no evidence of any earlier forms of brieve dealing with such questions or being in any sense forerunners in style of the brieve as it appears in the formularies of the Ayr and Bute manuscripts. The statute of 1230 states that when complaint is made to the king or his justiciar of dissasine from any tenement in which the complainer claimed to have been infeft, a royal writ is to be sent to the justiciar or the sheriff commanding them to determine the justice of the complaint. This is to be done by means of a recognition, or jury. Professor Barrow has drawn attention to a case before the justiciar of Lothian begun 'by the lord king's brieve of recognition'

12. APS i 400, c. 7. Cf. Duncan, Making of the Kingdom, 539 - 41, esp. at 541 n. 6 which I follow in my summary of the act's provisions; also Barrow, Kingdom, 114.

13. APS i 325, c. 35.

before 1242 and suggested that, since it came before the justiciar and involved a recognitio, it may have been a case begun by a breve of dissasine.¹⁴ On somewhat similar grounds it can be argued that a case before the sheriff of Berwick sometime between 1233 and 1235 is possibly another early example of the breve.¹⁵ This case is especially interesting in that the pursuers claim rights of estovers in a wood at Reston in Berwickshire, which belonged to the defenders, the priory of Coldingham. In England the writ of novel disseisin was used from its earliest beginnings in the twelfth century to protect common rights of pasture,¹⁶ and the author of Bracton argued that it could be used for common rights of all sorts, including estovers.¹⁷ If the view in Bracton was ever adopted in practice, it was obscured in the thirteenth century and the second Statute of Westminster had to declare in 1285 that the assize could be used to recover estovers before the king's justices.¹⁸ Prior to 1285 interference with estovers was dealt with by quod permittat writs before the sheriff,¹⁹ which were sometimes known as the 'little writs of novel disseisin' because they were pleaded without an assize in

14. Raine, North Durham, no. 378; Barrow, Kingdom, 115.

15. Durham Dean & Chapter Muniments, misc. ch. no. 1263 (Appendix A). It is also possible that the breve was one of mortancestor: see below, 203 - 4.

16. Glanvill XIII, 37; Sutherland, Novel Disseisin, 11.

17. Bracton f. 231 (iii 187 - 8). See also f. 235b (iii 199); Sutherland, Novel Disseisin, 135 n. 1; Novae Narrationes edd. E. Shanks and S.F.C. Milsom (Selden Soc., vol. 80) lxxxiii.

18. Statutes of the Realm i 84, c. 25.

19. Sutherland, Novel Disseisin, 63; Early Registers of Writs, 32, 72, 215 - 6; Novae Narrationes, lxxxiv - lxxxvi, 22, 77 - 8, 194 - 6.

the county court.²⁰ Can a parallel be drawn with England here, given that the Reston case was heard before the sheriff? The answer is, probably not. Apart from the fact that there is no evidence for any quod permittat form in the admittedly much later Scottish formularies, the act of 1230 does suggest that the justiciar might issue a brieve of dissasine himself, saving the complainer the need to approach the king's chapel, and in it direct that the case be heard by the sheriff. That such a procedure was followed may be borne out by a letter of Hugh Barclay, justiciar of Lothian, written in 1262, in which he states that he has issued 'two pairs of the king's letters of dissasine' to John Scott of Reston.²¹ Unfortunately it is not stated in which courts the actions will be heard. Another document dated 2 August 1247 narrates how Adam Spott impleaded Ranulf of Buncle 'by precepts of the lord king of Scots and of lord David de Lindsay then justiciar of Lothian' for certain lands in Buncle. The case was commenced in the 'county (comitatu) of Berwick', which suggests the sheriff's court, although a final settlement was reached in the 'court of the king of Scots' before Lindsay the justiciar.²² Possibly then this was a case heard initially before the sheriff on a brieve issued by the justiciar. Such a power did have an English parallel, although it should not be pressed too far: 'if the disseisin had been committed during a general eyre in the county, the justices in eyre could issue the

20. Early Registers of Writs, 85, 261.

21. Coldingham Corresp. no. 1. The 'pair' probably refers to the brieve of dissasine and to the summons of the defender to answer in court.

22. Fraser, Douglas iii no. 285; cf. Ross, Lectures ii 219 for a garbled version.

original writ themselves, saving the offended party a trip to Chancery'.²³ Perhaps then the pursuers in the Reston case had obtained a breve of dissasine from the justiciar addressed to the sheriff and were exercising facilities first made available by the act of 1230.

Another early case of dissasine, this time before the justiciar's court, may be the action in which Gilbert son of Samuel impleaded Maeldomhnaich earl of Lennox 'by letters of the lord king' for the lands of Monachkennaran in 1235.²⁴ The case was touched upon in another context in the previous chapter. The lands in question were attached to the church of Kilpatrick which the earl had subinfeudated to Paisley abbey. The rector of the church was the earl's younger brother Dougal, who had alienated the lands to Gilbert. Gilbert's title had been completed by a confirmation from the earl. In 1233 the abbey recovered the lands by action before papal judges-delegate, but Gilbert remained contumaciously absent from the proceedings, and the secular arm had to be brought against him to enforce the judgment. Perhaps the earl had been compelled by higher authority to eject Gilbert and the latter's reaction had been to bring a breve of dissasine. The case was settled with the earl agreeing to pay Gilbert sixty silver marks for the renunciation of his claim. Later, perhaps in the 1270s, the dean and archdeacon of Dunblane instructed Laurence dean of the Lennox to go 'to the pleas of the lord king at Dumbarton', probably meaning the justice ayre, and there

23. Sutherland, Novel Disseisin, 64 - 5.

24. Paisley Registrum, 170. For the other details of the case see 157 - 70 and above, 135 - 6.

to inhibit actions begun 'by letters of the lord king of perambulation or of recognition' against the abbot and convent of Paisley and their lands. The 'letters of recognition' may have been briefes of dissasine.²⁵

If to begin with the sheriff's jurisdiction in dissasine was co-extensive with that of the justiciar, this had ceased to be the position by the early fourteenth century and perhaps before. In the fourteenth century 'registers' the breve is always addressed to the justiciar.²⁶ Regiam Majestatem and Quoniam Attachiamenta both state that the action pertains to his court.²⁷ On this point the treatises are supported by the few cases of which there is any evidence. In 1319 the abbey of Dunfermline and the portioners of the barony of Fithkil were involved in a boundary dispute. The portioners, dissatisfied with the result of an earlier breve of perambulation, brought another action by a breve of dissasine, which was begun in the justiciar's court.²⁸ In 1342 an assize held in the full court of the justiciar at Inverbervie found that Sir William Mowbray had dissaised the abbot and convent of the abbey of Arbroath unjustly and without a judgment of various lands in the Mearns.²⁹ In 1368 Thomas Hay of Loquhariot (not to be confused with his contemporary, Thomas Hay of Erroll, constable of Scotland) brought a breve of dissasine against William Borthwick in the justiciar's

25. Paisley Registrum, 176. Laurence was dean of the Lennox in 1274: Watt, Fasti, 179.

26. Reg. Brieves, 40 (no. 21), 62 (no. 107).

27. Regiam Majestatem I, 4: Quoniam Attachiamenta chs. 36 and 53.

28. Dunfermline Registrum no. 352.

29. BL, MS. Add. 33245, ff. 156 v. - 157 r.

court at Edinburgh.³⁰ In 1430 Mariota Cunningham recovered the lands of Balwill and Ballaird from Susanna and Donald Christison by briefe of novel dissasine in the court of the justiciar south of Forth at Stirling.³¹ Finally we know of two cases of dissasine in 1433, both heard before the justiciar north of Forth at Perth.³² A final confirmation of the position can be found in a minor treatise probably written in the 1450s, the Ordo Justiciarie, which explains details of procedure in the justiciar's court. This gives a form of summons 'super Breve de Nova Dissaisina', whereby the sheriff is ordered to bring the defender before the justiciar's court.³³

It is striking how closely the form of the briefe, as it appears in the 'registers' and Quoniam, follows the wording of the act of 1230 which speaks, as do the styles, of the pursuer's complaint that he has been dissaised by another unjustly and without a judgment and states that a recognition of the good and faithful men of the neighbourhood should be held to make inquiry. If the complaint is found to be true, the pursuer is to be restored to his former sasine; if not, he is to be put in the king's mercy. In general the inspiration of the English writ is clear, both in the act and in the styles. It is tempting therefore to assume that the briefe assumed this form immediately. If so, many of the thirteenth century

30. APS i 505.

31. Aberdeen University Library, MS. 1160/18/9 f. 1 r. - v. (Appendix F).

32. Coupar Angus Chrs. ii no. 128.

33. APS i 706. The Ordo runs in the name of William Sinclair earl of Orkney and justiciar south of Forth. Orkney was chancellor 1454 - 56 (British Chronology, 175) and acted as justiciar at that time: ER vi 386, 433, 485.

briefes and cases which previous writers have thought to be examples of the briefe of dissasine can be disregarded. This is particularly so where the briefe in question is retourable and thus not pleadable.³⁴

The form appears to have been identical whether the briefe was called one of novel dissasine, as in the 'registers', or simply dissasine, as in Quoniam. The earliest direct reference, in 1262, is to the 'king's letters of dissasine'.³⁵ In the fourteenth century there are references both to briefes of dissasine (as in the cases of 1319 and 1368 mentioned above) and to briefes of novel dissasine. Thus the 1318 legislation of Robert I speaks in two chapters of the briefe of novel dissasine,³⁶ while in 1328 the abbey of Arbroath and its men were given temporary exemption from all suits or complaints to be brought against them, excepting only actions begun by briefes of novel dissasine or terce.³⁷ This document may suggest that the 'novel' element had substantive consequences in that the action might become time-barred, as in England. But the only Scottish source to refer explicitly to a time-limit beyond which novel dissasine was not available is Regiam which, in a passage borrowed from Glanvill, states that the time-limit was fixed periodically by the king's council.³⁸ It is perhaps important that by 1230, when the Scots introduced their remedy, the English had begun to relax the strictness

34. See e.g. cases cited Barrow, Kingdom, 116 nn. 156, 157.

35. Coldingham Corresp. no. 1.

36. APS i 470, c. 13; APS i 471, c. 19.

37. Arbroath Liber i no. 360. Compare the English letters close giving the beneficiary respite from actions other than novel disseisin, darrein presentment and dower unde nihil habet discussed in Sutherland, Novel Disseisin, 54 - 5.

38. Regiam Majestatem III, 32; Glanvill XIII, 32.

of the requirement of 'novelty'. In that year a plaintiff could sue on a disseisin ten years old, while from 1276 to 1546 the time limit beyond which novel disseisin could not go was May 1242;³⁹ thus, as Professor Sutherland remarks, 'in the fourteenth and fifteenth centuries the assize was for practical purposes free of any time limitation'.⁴⁰ In the absence of any specific evidence on time-limits in Scotland, it may well be that in fact there were none, but that does not mean that the word 'novel' was wholly without meaning. A document of 1434 which refers to two separate actions in the previous year, one begun by brieve of dissasine, the other by brieve of novel dissasine, suggests that there was some kind of formal distinction based on 'novelty'. This thought is supported by the fact that the ejection complained of under the brieve of dissasine had occurred seventy years previously. Unfortunately the document tells us nothing about the other brieve, but it seems reasonable to suppose that there the ejection had been a rather more recent event.^{40a}

This evidence shows that by the fifteenth century the brieve could stretch a long way back in time; a careful study of the 1318 legislation on dissasine suggests that this was also the case in the thirteenth and early fourteenth centuries. There are two acts dealing with the brieve of novel dissasine, of which the first, chapter thirteen, is relevant to the point under discussion.

39. Sutherland, Novel Disseisin, 55 - 7.

40. Sutherland, Novel Disseisin, 139.

40a. Coupar Angus Chrs. ii no. 128.

It reads as follows (translation below):

Item, ordinatum est et assensum quod quia ante ista tempora breve de nova dissaisina non solebat impetrari nec portari nisi super tenentem ita bene ubi tenens intravit per feoffamentum alterius sicut per dissaisinam et iniuriam suam propriam: Vult dominus rex et statuit quod de cetero ita bene nominentur in brevi de nova dissaisina dissaisitor sicut tenens eius et infeodator si sit vivus. Et si plures dissaisitores faciant unam dissaisinam et principalis dissaisitor moriatur antequam dissaisitus habuerit statum suum recuperatum propter hoc non perdat dissaisitus recuperacionem suam per breve de nova dissaisina quamdiu invenire poterit tenentem in vita aut dissaisitorem qui fuit ad dissaisinam factam. Et si tenens ita infeodatus impetraverit breve de garentya de carta pendente assisa penes suum infeodatorem vel heredes suos si voluerit propter hoc tamen non minus capiatur assisa ad primum diem placiti. Et si assisa transierit pro queralante quilibet dissaisiencium teneatur dissaisito ad dampna sua secundum tempus quo tenuit tenementum post dissaisinam factam. Et quicumque inventus fuerit dissaisitor cum vi et armis post istud statutum publicatum sit adjudicatus ad personam et grave amerciamentum ad voluntatem regis. Et istud statutum de dissaisina facta teneat locum tantummodo post statutum editum et non ante.

Item, it is ordained and agreed that, whereas before this time the brieve of novel dissasine was not wont to be impetrated or taken out except against the tenant, both where the tenant entered by the infeftment of another and where he entered by his own dissasine and wrong: the lord king wills and enacts that from now there shall also be named in the brieve of novel dissasine the dissaisor as well as his tenant and the feoffor if he is living. And if several dissaisors carried out a dissasine and the principal dissaisor has died before the person dissaised has recovered his estate, the dissaissee shall not on account of this lose his recovery by brieve of novel dissasine so long as he can find a living tenant or a dissaisor who was at the making of the dissasine. And if the tenant so infeft impetrates a brieve of warrandice of charter pending the assize against his feoffor, or his heirs if he wishes, on account of this, nevertheless the assize shall be taken at the first day of pleading. And if the assize holds for the complainer, the dissaised shall have as his damages for each dissasine according to the time of the holding after the dissasine. And whenever after the publication of this statute dissaisors are found to have acted with force and arms, they shall be adjudged to imprisonment and to a grave amercement at the will of

the king. And this statute of dissasine shall have force from the time of the proclamation of the statute and not before.⁴¹

This can be divided into five main sections, two of which are particularly revealing as to the question of time-limits in Scotland. The first of these begins by explaining current practice, that the brieve is only used against one who entered either by his own wrongful dissasine or through infeftment by another. This seems to mean that before 1318 the current possessor was named as the dissaisor in the brieve, regardless of whether or not it was he who had originally ejected the pursuer. But the act states that this practice is to be changed: the original dissaisor and the feoffor (if alive) are to be named as defenders alongside the current possessor.

We can best understand the significance of this provision by looking at thirteenth century English developments. To begin with, one disseised could only name his disseisor as defendant, but success in this action enabled him to recover from any third party put in after the disseisin. But about 1212 a new rule emerged, that the plaintiff should name both disseisor and any such third party in

41. APS i 470, c. 13. I differ from Lord Cooper's rather free translation of this statute (Selected Papers, 90) in one important aspect. He takes the passage 'vult dominus rex et statuit quod de cetero ita bene nominentur in brevi de nova dissasyna dissasytor sicut tenens eius et infeodator si sit vivus' to mean, 'It is hereby enacted that it shall be competent for the future to call as defenders to a brieve of novel disseisin (a) the original intruder, (b) the person in actual possession of the lands, and (c) if he is still alive, the person from whom the lands were derived by the person in actual possession'. I suggest that as the verb nominentur is in the subjunctive form and in a quod clause following words of command it ought to be translated 'they shall be named'. In other words the act is not merely permitting the pursuer to call the dissaisor and feoffor as defenders, it is compelling him to do so. This reading also balances the rather puzzling 'sicut tenens eius' with 'ita bene'. I read the passage as follows: 'The lord king wills and enacts that from now there shall also be named in the brieve of novel dissasine the dissaisor as well as his i.e. the dissaisor's tenant and the feoffor if he is living'. I think that this reading is the most consistent with the act as a

his writ, since the old law in effect meant that the latter could be put out of his holding without writ and by judgment in a suit to which he was not a party. Professor Sutherland has argued that this new rule was also a consequence of the lengthening time limits within which the assize could be brought. The old rule had come to operate unfairly, 'for the third party who was holding the land might have come in years after the disseisin and held in good peace for a long time before the assize was brought'.⁴² Towards the end of the thirteenth century, in another reflection of the expansion of the time limits, the law was further developed to meet the contingency of feoffees intermediate between the disseisor and the current tenant, requiring the plaintiff to name them if they were alive.⁴³ Novel disseisin was thus available even though so much time had passed that feoffees of the disseisor had died and their heirs had come into possession. It was however always essential to name the disseisor: 'the form of the original writ was never adapted ... to make any room for a defendant who was named simply because he was tenant and not because he was supposed to be guilty of disseisin'.⁴⁴

The 1313 act can therefore be seen as a second attempt to solve a problem created by the lengthy period within which the action of dissasine was competent in Scotland also. The first solution had been sharply distinct from that developed in England and may suggest

42. Sutherland, Novel Disseisin, 57.

43. Sutherland, Novel Disseisin, 139 - 41.

44. Pollock and Maitland, History of English Law ii 56; Sutherland, Novel Disseisin, 58.

that the act of 1230 did not after all establish the brieve in its final form. The second solution is an adoption of the English rules as they had stood from the late thirteenth century; as we shall see, this characterises the whole of the act.

The next provision deals with dissasines carried out by several persons. If the principal dissaisor were to die before the dissaissee had recovered his estate then the action could be brought against any living person who had taken part in the dissasine, or who was a tenant of the lands in the life of the principal dissaisor. Again passage of time between the dissasine and the raising of the action is implied. The act was following English precedent established in the reign of Edward I (1272 - 1306) and as Professor Sutherland notes the development allowed the assize to be used long after the original disseisin.⁴⁵ The point is reinforced when it is noticed that here the act makes an exception to its earlier provision about who should be named in the brieve. Actions may be directed against one who has become a tenant after dissasine by a group without bringing in any of the other parties involved. However we can derive one time limit, albeit not an especially severe one, from this provision. The act expressly states that it is to prevent the dissaissee losing his right of action on account of the death of the principal dissaisor that he is enabled also to sue the other participants or the tenant. The implication is that the brieve of dissasine was only competent during the lifetime of the dissaisor, a rule similar to that of English law. It looks as though this rule was also part of pre-1318 Scots law.

45. Sutherland, Novel Disseisin, 141 - 2.

The act goes on in its third provision to discuss the position of the tenant sued as a result of the death of all those involved in the original dissasine. He may if he wishes take out a brieve of warrandice of charter against the person who infeft him, or his heirs; nevertheless, says the act, the assize is to proceed against him at the first day of pleading. It was of the essence of dissasine in Scotland, as in England, that no essonzies, or excuses from appearance, were allowed to the defender and that the case should be determined on its first day in court. We can see this rule in operation in 1433 when it was only with the consent of the pursuer that his case of dissasine was continued to a second day.⁴⁶ Nothing was to delay the action and the Glanvillian rule that the tenant who calls a warrantor in disseisin loses the action immediately is found in Regiam Majestatem also.⁴⁷ Thus the warrantor could not take over the defence of the action in place of the tenant. In thirteenth century England however it became possible for the tenant to start a separate action against his warrantor by the writ warantia carte: if he lost in the assize, he would then be able to recover from his warrantor lands elsewhere of equal value to those from he had just been put out.⁴⁸ This is the position which the Scottish act seems to achieve. It is not known when the brieve of warrandice of charter was introduced; it appears in the Ayr manuscript as a form of writ de compulsione in the name of king Alexander,

46. Regiam Majestatem III, 32; Quoniam Attachiamenta ch. 36; Coupar Angus Chrs. ii no. 128.

47. Regiam Majestatem III, 32; Glanvill XIII, 38.

48. Sutherland, Novel Disseisin, 131, 218.

implying a thirteenth century date.⁴⁹ Other evidence shows that generally the effect of raising a *briefe of warrantice* was to sist or suspend the principal action:⁵⁰ the effect of the act is therefore to preserve the special position of *dissasine* with regard to warrantice, but also to permit the deflection of the burden of the action from the tenant infert after *dissasine* by a group.

It has been said that the 1318 act altered procedure in *dissasine* 'in favour of the dispossessed pursuer'.⁵¹ But our interpretation of its provisions so far suggests a different conclusion, that the act favoured the sitting tenant who had come in after the *dissasine*. In general the pursuer had to search out the other parties involved and bring them into his action. A crucial consequence was the spreading of the pains of losing the action, either by use of the *briefe of warrantice* in the case of the tenant infert after *dissasine* by a group, or, in other cases where the tenant had been put in after any form of *dissasine*,⁵² by allocating the damages amongst the parties involved. This is provided for by the act which states that the *dissaisee* shall recover damages from each of the *dissaisors* in proportion to the time which each of them spent in the lands. We do not know how the quantum would have been

49. Reg. Brieves, 39 (no. 16). See also *ibid.*, 43 (no. 36), 54 (no. 16) and Quoniam Attachiamenta chs. 38 and 56.

50. Regiam Majestatem I, 15; Quoniam Attachiamenta ch. 38; Reg. Brieves, 61 (no. 96); and see further below, 202 and 242.

51. Barrow, Bruce, 417.

52. There seems to be no evidence to show that in Scotland the tenant could vouch a co-defender in *dissasine* as his warrantor and then drop out of the action. Clearly this would not be possible before 1318 if only the tenant was named as defender; it would have been possible from 1318, but there is no express provision in the act about this. The question arises because such a rule developed in England once it became possible to sue both disseisor and tenant in the one action: Sutherland, Novel Disseisin, 218 - 19. This was in addition to the action by warantia carte.

assessed - Regiam Majestatem states a maximum of ten marks, but Quoniam Attachiamenta, which is supported on this point by a case of 1430 in which the pursuer was awarded 100 marks by way of damages, allows recovery of the whole of the pursuer's loss through his exclusion⁵³ - but this reduction of his liability must have been one of the most important consequences of being merely a co-defender for the losing tenant. The provision also underlines the point that actions of dissasine knew no formal time limit.

If it is asked why the legislators of 1318 should have wished to give this kind of protection to tenants who had entered their lands after a dissasine, the political situation of the time, in which Robert I was ready to restore those disinherited during the recent wars to their lands if they were ready to enter his allegiance, should be borne in mind.⁵⁴ Such a policy must have led to clashes of interest between those put out in the wars through their English allegiance and those who had gained possession as a result, in which perhaps the former might have raised actions of dissasine to recover their lands. It is surely against a background where the king's loyal adherents (and their tenants) were uncertain to what extent they would be able to retain their new lands against the returning disinherited that chapter thirteen of the 1318 legislation was enacted. This would explain its preoccupation with old dissasines. A similar rationale may well underlie chapter nineteen, the other act of 1318 dealing with dissasine: the defender here, as also in *briefes of right and mortancestor*, was to have full opportunity to consider the

53. Regiam Majestatem III, 32; Quoniam Attachiamenta ch. 36; Aberdeen University Library MS 1160/18/9, f. 1 r - v. (Appendix F).

54. Barrow, Bruce, 380 - 92; and see above, 126 - 8.

case against him and to state his own position.⁵⁵

There are of course provisions in the 1318 act which clearly favour the pursuer, for instance where the dissasine had been carried out by a group. The final provision of the act also lays down a rule which, while not strictly in favour of the pursuer, is a harsh measure against the dissaisor. Those who are found to be dissaisors cum vi et armis after the publication of the statute are to be imprisoned (adjudicatus ad personam) and are also liable to a major amercement or fine at the king's will. This appears to add to the Glanvillian rule stated in Regiam⁵⁶ and echoed in the brieve itself that the guilty defender must pay a fine to the king's use, by imposing a stricter penalty on those who dissaise with violence. Was this intended to deter those of the disinherited who might be tempted to self-help? If so, it may well stand alongside chapter twenty-five of the 1318 legislation which affirmed the rule that no man was to be put out of his freehold without the king's brieve.⁵⁷ The provision ought also to be interpreted in the light of the act of which it is part and which is intended to create joint liability amongst the original dissaisor and those who derived their title to the lands from him. Such subsequent tenants are also dissaisors liable under the brieve, but they did not dissaise cum vi et armis; that would be most likely to happen in the act of ejecting the person who is now the pursuer. Thus it would be the original

55. APS i 471, c. 19.

56. Regiam Majestatem III, 32; Glanvill XIII, 38.

57. APS i 473, c. 25. See also above, 126 - 8.

dissaisor rather than the current possessor who would be liable to this penalty. Again therefore the policy of protecting the tenant is apparent; it is also noteworthy that in framing this reform an English provision, the first Statute of Westminster of 1275, was being followed.⁵⁸

Much can be learned of the substantive effect of the brieve both before and after 1318 from this legislation; more can be discovered from looking at the form of the brieve itself. The style in the Ayr manuscript says that the pursuer must have been vest and saised of the lands as of fee or as of terce (dote) or by a rent (firma) the term of which has not yet expired.⁵⁹ This last suggests another interesting contrast with England where only the life-tenant and tenant pur autre vie, and not the mere termor, were protected in their seisin by the assize;⁶⁰ but there is no further Scottish evidence on this point. In Quoniam the brieve states that the pursuer must have been vest and saised as of fee,⁶¹ while in the Bute manuscript the formula is simply, that the pursuer was vest and saised of the lands.⁶² It is difficult to draw any clear picture from this what interest in the lands a pursuer had to show he held before the dissasine. Something can perhaps be made, however, of a

58. Statutes of the Realm i 35, c. 37; Sutherland, Novel Disseisin, 134, 219 - 20.

59. Reg. Brieves, 40 (no. 21), reading with Cooper (ibid., 15) nondum for the original's dum, which makes no sense in the context.

60. Sutherland, Novel Disseisin, 12 - 13, 32, 135 - 8.

61. Ch. 53.

62. Reg. Brieves, 62 (no. 107) gives only a brief summary of the original which I have examined in a photostat copy: Edinburgh University Library, Phot. 1141, f. 33.

Regiam passage which states that the brieve of dissasine 'touches only liberum tenementum'.⁶³ We have already seen that in later medieval Scotland 'liberum tenementum' meant in effect any life interest in land, whether or not that interest was heritable, a common example from the fourteen century onwards being the liferent which fathers often reserved to themselves when granting the fee of their lands to their sons.⁶⁴ In England the assize protected freeholdings - that is any tenancy for life - and it would be surprising if the Scottish brieve was not of at least comparable scope. Terce, the widow's liferent of part of her husband's estate, is specifically referred to in the Ayr manuscript. When in 1368 Robert Stewart lord of Menteith complained before the king and parliament that his wife was being excluded from her terce of a former marriage by Archibald Douglas and it was successfully argued that he should have recourse not to parliament but to the common law in the justiciar's court, was it the case that the appropriate remedy, given that the lady had already been served to her terce, would have been a brieve of dissasine?⁶⁵

In this context it is of interest to note the statute of 1434 which introduced the brieve de aqueductu into Scottish practice.⁶⁶ The brieve was clearly modelled on that of dissasine. It began by narrating the pursuer's grave complaint that he had been disturbed and molested unjustly and without a judgment in his possession of the

63. Regiam Majestatem IV, 40.

64. See above, 147 - 52.

65. APS i 505. This case is discussed further below, 298 - 9.

66. APS ii 22, c. 2.

waterway at his mill. The court was instructed to restore him to his possession if the complaint was true.⁶⁷ Perhaps the reason for this legislation was a decision that such a possession was not a freehold recoverable by the brieve of dissasine. If so, the position may be contrasted with that in England, where the assize seems to have been available for diversions of watercourses.⁶⁸

What seems to emerge from this is a fuller understanding of what was meant by contemporary writers when they spoke of dissasine as a possessory remedy. It was not that the pursuer need only be someone who had had possession, with or without right thereto. Rather it was that the pursuer did not have to show his heritable title, or fee. Medieval jurists battled to fit the realities of their land law into the sharp Romanist contrast of ownership and possession: ownership meant heritable title, therefore all else must be possession only. But even in Scotland with its relatively simple structure of interests in land that dichotomy did not fit the facts of legal life. To say that a man was not a proprietor did not preclude his having some other interest in or claim to the land; many of these he could recover, even against the heritable proprietor, by the brieve of dissasine. Indeed it may not have been uncommon for, say, a tercer to recover against the person who held the fee. But it is a long way from that to say that someone who had gained possession without any shadow of right could bring the brieve successfully when he was

67. For a case of 1482 see HMC xliv, 15 (8), 48 (no. 96). So similar are the brieves of dissasine and aqueductu that Cooper and Walker mistake the aqueductu in St. Andrews Formulare i 254 for a dissasine.

68. Sutherland, Novel Disseisin, 63, 216 - 7.

turned out by the true owner. Professor Sutherland has shown us that, no matter what Bracton might have said, in England the mere wrongful possessor was not normally protected by the assize against disseisin by the true owner;⁶⁹ it is probable that the position was the same in Scotland. In any case it is clear that dissasine in Scotland was far from functioning as a merely 'possessory' remedy. As Maitland remarked 'a possessory action is likely to lose some of its possessory characteristics if the plaintiff is suffered to rely on ancient facts'.⁷⁰ It is clear from the 1318 legislation that even before that time the action enabled a challenge to another's title to land if its ultimate source lay in a dissasine of the pursuer by someone who was still alive and, from 1318, named in the breve. That event need not be and often was not a recent one; again we can refer to the 1433 case where the action was brought seventy years after the dissasine.

Briefes of dissasine, novel or otherwise, were still known in mid-fifteenth century Scottish legal practice and, to judge from the cases of 1433 and the Ordo Justiciarie, terminology and procedure had changed little since its introduction in 1230. But to the best of my knowledge there are no subsequent references to this form of action and it must be assumed that sometime in the second half of the fifteenth century the breve began to fall out of use. A statute of 1504 envisages the pursuit of pleadable briefes (note the plural) in the justiciar's court.⁷¹ We know of three pleadable briefes which

69. Sutherland, Novel Disseisin, 97 - 104.

70. Pollock and Maitland, History of English Law ii 52.

71. APS ii 254, c. 41.

were taken before the justiciar: de proteccione regis infricta (which, it will be recalled, may have been abolished in 1430 and is not mentioned in the Ordo Justiciarie), mortancestor (of which, as we shall see, there are cases in the later fifteenth century) and dissasine. Thus the 1504 act implies the continued use of the brieve of dissasine. But if not already gone it was undoubtedly passing out of legal currency. The formulary which contains styles of various pleadable brieves in use by the regality chancery of the archbishop of St. Andrews about 1520 has no form for dissasine, although it does include others for right and mortancestor.

(c) The brieve of mortancestor

In many ways the story of the brieve of mortancestor seems to parallel that of dissasine closely. There is a reference which establishes its existence in Scotland in the mid-thirteenth century. In 1253 Emma of Smeaton sued the abbey of Dunfermline by royal letters of mortancestor, claiming lands in the fee of Musselburgh which had been held by her father.⁷² The case was settled, but it is clear that the basis of Emma's action was, as one would expect with mortancestor, a claim to succeed to an immediate ancestor who had died vest and saised in lands which were now being unjustly withheld by some unentitled person. This is also the substance of the brieve as it appears in the registers and as it is described in Regiam and Quoniam.⁷³ As such the brieve is obviously modelled on the English writ of mort d'ancestor. Its difference from the brieve of inquest,

72. Dunfermline Registrum nos. 82, 83.

73. Reg. Brieves, 40 (no. 20), 62 (no. 106); Regiam Majestatem III, 24 and 25; Quoniam Attachiamenta chs. 35 and 52.

as following contemporary usage we shall call it,⁷⁴ is also plain. By the brieve of inquest an individual established his title to inherit a deceased person's lands. This seems always to have taken place in the sheriff court. It was a formal procedure, the result of which would be retoured to the king's chapel. A precept of sasine would then be issued ordering that infeftment of the heir take place. A brieve of mortancestor was pleadable and not retourable; the successful pursuer was given sasine immediately. The action was directed not only at establishing the claim of the heir but also at ejecting an intruder who was summoned to defend the action.

Like dissasine mortancestor proceeded without essonzie although, as we have seen, in 1318 it was laid down that the defender should be given an opportunity to hear the brieve and to consider the case against him. According to Regiam the defender's failure to compear on the first day did not entail loss of the case but merely adjournment to a second day. However Quoniam states that if the defender did not answer the summons the case was to be decided at once and on this is borne out by a litigation of 1455 where the defenders apparently failed to compear to answer brieves of mortancestor, which were at once put to the recognition of an assize.⁷⁵ The action was heard by an assize of the good and faithful older men of the neighbourhood, invariably

74. See e.g. Reg. Brieves, 41 (no. 22) ('generalis inquisicio'); APS ii 253, c. 40; ADA *135; ADC i 34. It is not true to say, as Cooper does, (Reg. Brieves, 14), that the term mortancestor 'is of very frequent occurrence in Scottish charter records of the thirteenth century' as a description of the brieve of inquest or, indeed, at all.

75. See note 73 above; APS i 471, c. 19; also Regiam Majestatem IV, 49; Quoniam Attachamenta ch. 35; SRO, Society of Antiquaries Writs, GD 103/1/7 (Appendix G).

according to the so-called Assize of David I.⁷⁶ Unlike dissasine the defender in mortancestor might have the action sisted while he called a warrantor and there is at least one example of this procedure in a case of 1465.⁷⁷ The scope of the action was widened in another act of 1318 so that an action could be brought by a pursuer tracing his right to succeed from grandparents as well as from parents, uncles, aunts and siblings.⁷⁸ As Lord Cooper noted, this brought Scots law into line with the position already achieved in England.⁷⁹ There the writ of mort d'ancestor was similarly limited to begin with; the person drawing his right from the seisin of grandparents and other more remote relatives was first offered protection by the writs of aiel, besaiel, tresaiel and cosinage (which last went further than even post-1318 Scottish mortancestor actions) about 1237. This suggests that the Scots' initial adoption of mort d'ancestor took place before that date, perhaps at about the same time as they borrowed the idea of novel disseisin.

Finally, this 1318 act, by contrast with that on dissasine, is surely in favour of the disinherited returning to Scotland after 1314 to reclaim lands after the dislocation of the wars of independence already discussed. Before the act those who sought

76. APS i 325, c. 35.

77. Regiam Majestatem IV, 19; SRO, Lord Advocate's Department, AD 1/60 (Appendix D).

78. APS i 472, c. 23.

79. Reg. Brieves, 14 - 15; Pollock and Maitland, History of English Law ii 57.

recovery of ancestral lands of which they themselves had never been possessed could only have used mortancestor if a member of their own or an immediately preceding generation had died vest and saised. If the relative had not been infeft on death - if, for example, he had been put out during the wars - then only the lengthy procedures of the brieve of right would have been available to his heirs. By permitting claimants to start their mortancestor claims a further generation back, there was more chance of reaching the time of peace and settled conditions under Alexander III and an ancestor who had died in sasine of the lands.

There are perhaps a couple of examples of a brieve of mortancestor pre-dating the case of Emma of Smeaton in 1253. One is the case about estovers already mentioned in the discussion of dissasine. A brieve of mortancestor, like one of dissasine, was one of recognition.⁸⁰ What suggests that the brieve of recognition in the estovers case might be one of mortancestor is the word used to describe the parties raising the action. The word is petentes, translated in England as 'demandants' and said to be appropriate for mort d'ancestor but not for novel disseisin where instead one speaks of the plaintiff or querens. This follows Bracton's learning that novel disseisin is a possessory action whereby one complains of an essentially personal wrong while mort d'ancestor is petitory and does not necessarily reflect on the conduct of the other party. But, as Maitland pointed out, this sits uneasily on the reality of the two actions. In Scotland it is even less clear whether the language used to describe the parties has any significance of this

80. Regiam Majestatem I, 4; III, 24.

kind. Although in one case of 1430 we do find the pursuer under a brief of novel disseisin described as 'prosequens',⁸¹ a word with suggestions of wrong and of complaint, in the later medieval period, the normal Latin usage was that of actor and reus, without any apparent variation amongst the forms of action.⁸² It is not impossible however that the estovers case was one of mortancestor. There are some early thirteenth century cases where estovers were recovered by mort d'ancestor in England,⁸³ although later this function was taken over by quod permittat writs in the nature of mort d'ancestor and was not regained under the second Statute of Westminster.⁸⁴ Another possible case from the middle of the thirteenth century is the action which Mariota daughter of Samuel raised by royal letters against the bishop of Glasgow concerning the lands of Stobo in Peeblesshire. Mariota and her sister's son both eventually quit - claimed the bishop of the lands; it is thus possible that the basis of her claim was a right of inheritance derived from Samuel. Accordingly, as Professor Barrow has suggested, this may have been a case of mortancestor.⁸⁵ If so - and we cannot

81. Aberdeen University Library MS 1160/18/9 f. 1 r. - v. (Appendix F); but note that in 1435 the pursuers in a case before parliament were described as 'actores et prosequentes' (APS ii 23, c. 1).

82. See Pollock and Maitland, History of English Law ii 571 n. 2, 572 on this terminology.

83. Novae Narrationes, lxxxiii.

84. Novae Narrationes, lxxxvi; Roll of the Shropshire Eyre of 1256 ed. A. Harding (Selden Soc., vol. 96) xxx.

85. Glasgow Registrum nos. 130, 131 and 172; Barrow, Kingdom, 115 - 6. For another possibility see below, 224.

be sure - then it seems that in its early days mortancestor, like dissasine, might be taken in the sheriff court.

However the Regiam, the Quoniam, the registers⁸⁶ and surviving examples of the use of the brieve from the fourteenth century show that later it pertained only to the court of the justiciar. A writ in the Bute manuscript directs the sisting of procedure before the justiciar in a brieve of mortancestor.⁸⁷ In 1321 two justiciars were assigned to hear the cause of John de Mora against Sybil de Quarentely and John Cissor on a brieve of mortancestor. The doom given stripped the defenders of their lands.⁸⁸ A document dated 10 December 1368 and printed for the first time recently follows the style of the brieve of mortancestor in the Ayr manuscript almost exactly. It is addressed to three justiciars and commands them to hold a recognition of the good and faithful and older men of the country to see whether the late William Douglas of Liddesdale, uncle of the pursuer, died vest and saised as of fee of lands in Peeblesshire. If so, and if the pursuer, James Douglas of Dalkeith, is his lawful and nearest heir, and if Roger Carruthers with his wife Isabella is unjustly detaining the lands then the justiciars are to put Douglas into the lands so that he holds as his uncle did on the day when he was alive and dead.⁸⁹ In an interesting document of 1390 Murdoch Stewart, justiciar north of Forth, narrates how Thomas Hay of Erroll, the constable, presented a brieve of

86. See note 73 above; also Regiam Majestatem I, 4.

87. Reg. Brieves, 61 (no. 96).

88. APS i 479; RMS i app. 1 no. 74.

89. RRS vi no. 417.

mortancestor against William Keith the marischal in the full court of the justice ayre at Dundee. An assize of the best and worthiest of the country finds that Thomas is the lawful and nearest heir of his grandfather John Keith in the lands of Innerpeffray in Perthshire and that William is unjustly detaining them. Thomas is to have the sasine which his grandfather had on the day when he was alive and dead.⁹⁰ This appears to be a classic case of mortancestor and an application of the statutory provisions of 1318. Murdoch Stewart heard another such case in 1397 in his capacity as justiciar north of Forth, when Alexander Murray of Colbyn and William son of John of Badfothal sought to recover the third part of the barony of Badfothal by a brief of mortancestor. They alleged that Michael Mercer was unjustly detaining these lands. An assize found that Marjorie, the pursuers' grandmother, died seised as of fee of the third part of the barony and that as Alexander and William were the lawful and nearest heirs they should have sasine and heritable possession.⁹¹ It seems clear that when in 1369 James Douglas of Dalkeith and William Cresswell agreed to have the controversy between them over the lands of Roberton in Lanarkshire settled by a brief of mortancestor, the case would have been heard in the justiciar's court.⁹² It is also apparent that at the end of the fourteenth century that brief retained a character quite distinct from that of the brief of inquest.

We can therefore correct what it is now apparent is an editorial

90. Spalding Misc. ii 319.

91. Aberdeen - Banff Ill. iii 263.

92. Morton Registrum ii no. 107.

slip in the sixth volume of the Regesta Regum Scottorum. It is clearly wrong to index the brieve of 1368 referred to in the previous paragraph as a 'brieve of inquest'.⁹³ The same observation holds good of a fragment printed in that volume which is also indexed as a 'brieve of inquest'. That is addressed to the justiciar south of Forth who is commanded to recognosce by good and faithful and elder men of the country whether the late John Helbek, brother of the bearer of the brieve, Matthew Helbek, died vest and saised as of fee in Calderside in Lanarkshire.⁹⁴ Nothing else survives of this brieve, but there is more than enough to show that it is one of mortancestor properly speaking, and that it went on to suggest that someone was unjustly withholding the lands from Matthew.

When we move into the fifteenth century, we find it quite clear that the brieves of inquest and of mortancestor continued to be distinct entities. In 1437 William Douglas lord of Drumlanrig recovered from Janet Murray, widow of the late James Gledstanes, certain lands near Hawick in Roxburghshire in which his father had died vest and saised as of fee and which Janet now unjustly detained. The action was begun by brieve of mortancestor and decided in the justiciar's court. In the collection where the record of this case is printed there immediately follows an example from 1438 of proceedings by brieve of inquest where a person was served heir to lands in which his father had died vest and saised as of fee. This took place in the sheriff court and there is no mention of any

93. RRS vi, index (s.v. 'brieves'). It is correctly noted as 'brieve of mortancestor' later on in the index.

94. RRS vi no. 503 and index, s.v. 'brieves'.

intrusion upon the lands by some unentitled person.⁹⁵ Whether or not the juxtaposition is intentional, it shows clearly the survival of the distinction between briefes of mortancestor on the one hand and inquest on the other.

Other fifteenth century evidence shows the briefe of mortancestor continuing to wear its badges of identity, namely, the existence of an intruder defending the action and the jurisdiction of the justiciar. Thus in March 1455 Margaret Mundell pursued two briefes of mortancestor against different defenders before Laurence lord Abernethy of Rothiemay, justiciar south of Forth. Briefes to summon the defenders had been sent to the sheriff of Dumfries by the justiciar and executed by the king's sergeant. Finally the assize pronounced a verdict in Margaret's favour.⁹⁶ The Ordo Justiciarie provides a form for the summons of the defender on a briefe of mortancestor,⁹⁷ and there is an actual example of such a writ from 1467. In it William Edmonstone of Duntreath, justiciar south of Forth, commands the sheriff and baillies of Lanark to cause the parties to a briefe of mortancestor of the lord king's chapel to compear before him at the next ayre at Lanark for the determination of their case.⁹⁸ In January 1465 William Douglas of Drumlanrig, grandson of the pursuer in the case of

95. Fraser, Douglas iii nos. 301, 302.

96. SRO, Society of Antiquaries Writs, GD 103/1/7 (Appendix G). An abbreviated version of this document is printed PSAS 41 (1906) 313 and discussed in A. Cameron Smith, 'Mundeville of Tinwald and Mundell in Tinwald', Dumfries-shire Transactions 3rd series, 22 (1938 - 40) 95 - 104.

97. APS i 706.

98. Morton Registrum ii no. 223.

1437 mentioned in the previous paragraph, sought other lands in Hawick by brief of mortancestor before the justiciars south of Forth, this time from Alexander Gledstanes, probably the son of the previous defender. Douglas relied on the right of his grandfather and succeeded before the assize to which the brief was put.⁹⁹ A year later Gilbert lord Kennedy recovered certain lands from Robert lord Fleming by brief of mortancestor pursued in the court of the justiciar at Dumbarton. The assize found that Gilbert's grandfather had died vest and saised as of fee in the lands and that Robert was now unjustly detaining them.¹⁰⁰ Both these examples look identical to the cases of 1390 and 1397 referred to earlier and show that the rule enacted in 1318 allowing mortancestor claims to be based on the titles of grandparents was still fully operational.

It is of some interest therefore to study a case of 1471 in which Andrew Bissett came before the auditors of parliament to false a doom which had been given in the justice-ayre of Cupar upon a 'brief of mortancestry'. The auditors referred the question to the next parliament because they could 'nocht now be avisit be the lawys that thai find written to declare quhat order and proces salbe had in the proceeding of the said brief'.¹⁰¹ On the face of it this would suggest that mortancestor was becoming obsolete, but such a conclusion is not borne out by parliament's subsequent actions. A statute was passed, the order and form of which were 'to be observit and kepit in al pointis in the proceeding of the brief of mortancestrie

99. SRO, Lord Advocate's Department, AD 1/60 (Appendix D).

100. SRO, Ailsa Muniments, GD 25/1/102 (Appendix H).

101. ADA, 12.

purchest be Andro Bissate agane the lord of Ardros and now dependand in the justice are of Couper', as well as in the pursuit of pleadable brieves generally. The doubt of the auditors seems therefore to have concerned a general point, rather than being the result of a revival of an outmoded form of action. This is confirmed by the tenor of the statute itself, which deals with the formalities of pleading and falsing the doom and which has been discussed in the previous chapter.¹⁰² The doubtful question related to procedure and pleading, not to the nature of the breve of mortancestor. Bisset's action seems to have progressed slowly to its conclusion. In 1478 he again falsed the doom before the auditors, who declared that the decision of the justice-court 'upoun the breve of morthancestre ... was evil gevin and wele agane sayd ... for diverse and mony resonis'.¹⁰³ There is no sign in the records of this case that the breve of mortancestor was even beginning to lose its identity, although we can perhaps see reasons why potential litigants might wish to use other, speedier remedies.

We are now in a position to re-examine a statute of 1430 first printed by Professor Dickinson, which states that 'fra hyne furth thar sal na bref of mortansister pass fra the kyngis chapel bot in maner and furm as his ordanit in Robert the Browsys statutis, that is to say, of lineale successioun and nocht of taylze'.¹⁰⁴ Professor Dickinson's analysis of the statute proceeded to some extent on the

102. APS ii 101; and see above 157 - 8.

103. ADA, 66.

104. W.C. Dickinson, 'The acts of the parliament at Perth 6 March 1429/30', SHR 29.(1950) 1 - 12 at 5 - 9.

basis that by this time the brieve of mortancestor was identical in effect to the brieve of inquest. However it is now plain that the statute is referring to the pleadable brieve which enabled heirs to recover from intruders the lands of which their ancestors had had heritable sasine. It would seem that the policy behind the statute is to restrict the scope of the brieve rather than being, as Professor Dickinson thought, some sort of attempt to undermine tailzies and indeed this is a much more intelligible explanation of it than the one he offers.

The statute offers interesting support to the thesis tentatively advanced by a number of writers that in medieval Scotland the tailzied fee was not distinguished from the fee in which inheritance was unrestricted and determined by the rules of the common law.¹⁰⁵ Regiam states that mortancestor 'touches' fee and freehold and that in this it 'exceeds' novel dissasine which touches only freehold.¹⁰⁶ What this means is that in mortancestor the pursuer's claim was necessarily to a fee or heritable title, based as it was on the claim to inherit from a deceased ancestor, whereas, as we have seen, in dissasine the title claimed by the pursuer did not need to be a heritable one. The suggestion that prior to 1430 one whose claim to succeed arose not through the ordinary rules of primogeniture but through the provisions of a tailzie could enforce his right against intruders by the brieve of mortancestor is borne out by the action which James Douglas of Dalkeith brought against Roger and Isabel Carruthers in 1368.¹⁰⁷

105. See e.g. Dickinson, 'The acts of the parliament', 6, 8; C.D'O. Farran, Principles of Scots and English Land Law (Edinburgh, 1958) 98 - 102, 158 - 163; A.W.B. Simpson, 'Entails and perpetuities', JR 24 (1979) 1 - 20 at 19; R. Burgess, Perpetuities in Scots Law (Stair Soc., vol. 31) 66 - 73.

106. Regiam Majestatem IV, 40 and see above, 147 - 52 and 197.

107. RRS vi no. 417.

Douglas, it will be recalled, sued in right of his uncle, William Douglas of Liddesdale. Now when William died in 1353 he left a daughter Mary who inherited his lands. But in 1351 William had granted the lands which were to be contested in 1368 to James, with the proviso that James would take only if William died without male issue. There were several other provisions to ensure the succession of heirs - male.¹⁰⁸ Mary Douglas died in childbirth in 1367, which actually left James as the heir of line, entitled to all the heritage that had belonged to William.¹⁰⁹ But he did not make his 1368 claim as Mary's heir, but directly as William's. James' action was thus based on the tailzie of 1351. Indeed it seems likely to have been the outcome of a conflict over the lands between James and Mary. If Mary had claimed the lands as heir-general and put in the Carrutherses as her vassals, then if James were her heir he would be bound to warrant their title. If however Mary had no right over the lands through the 1351 entail, then James could get rid of her feoffees as intruders. Regrettably we can only speculate as to whether facts like those suggested lie behind our records of this case; but it can be said that James' action appears to be based on his right as heir of tailzie to William rather than on the other right available to him as heir of line to Mary. An action of mortancestor, moreover, implies that James had never had sasine of the lands he claimed.

108. Morton Registrum ii no. 70.

109. Scots Peerage vi 341 - 3. See also W.D.H. Sellar, 'Courtesy, battle and the brieve of right', Miscellany II (Stair Soc., vol. 35) 1 - 12, Fraser, Douglas i 253 - 4 and Neilson, Trial by Combat, 216 - 7.

In England by this time the heir of entail was confined to his remedies by the writs of formedon under the famous statute of 1285, De Donis Conditionalibus,¹¹⁰ although it is worth noting that prior to its enactment, mort d'ancestor was competent where the issue in tail were heirs general and their ancestors had died seised.¹¹¹ In Scotland, tailzies were generally in favour of the male line of heirs and failure of that line was comparatively rare. This, coupled with the much greater control of alienation exercised by Scottish superiors by contrast with their English counterparts, probably accounts for the lack of difficulty experienced with tailzies in Scotland and certainly explains why mortancestor continued to be a most appropriate form of action for the heir of tailzie seeking entry against an intruder. Even after 1430 where the persons of the heir general and the heir of tailzie merged in one man, then mortancestor could be used without infringing the statute. Thus in 1466 Gilbert lord Kennedy brought the brieve against Robert lord Fleming not only as heir general but also as heir under a tailzie of 1385.¹¹²

It was De Donis which was primarily responsible for the development of the concept of the fee tail in England and the consequent elaboration of the doctrine of estates in land. It is most unlikely that the Scottish act of 1430 had or was intended to

110. Statutes of the Realm i 71 - 2, c. 1; Simpson, Introduction to the History of the Land Law, 78.

111. S.F.C. Milsom, 'Formedon before De Donis', Law Quarterly Review 72 (1956) 391 - 7, esp. at 394; Pollock and Maitland, History of English Law ii 28 - 9.

112. SRO, Ailsa Muniments, GD 25/1/20 and see D. Cowan, Historical Account of the Noble Family of Kennedy (Edinburgh, 1849) 12 - 23 and Scots Peerage ii 44 - 54 for the Kennedy descent.

have a similar effect. No new remedy was offered to the heir of tailzie unable to gain entry against an intruder or to use mortancestor as heir general. This seems to leave the brieve of right as the only available remedy, but if so, that would not have led a lawyer to suppose that the tailzied fee was different in kind from a fee the succession to which was open to heirs general. As we shall see, the brieve of right also protected heirs with such a claim. Our lawyer would merely have seen the interposition of a longer procedure between the heir of tailzie and the realisation of his right.

In conclusion there can be little doubt that the brieve of mortancestor remained in use as a distinct form of action until the end of the fifteenth century. The sources give no direct information on its operation after 1478, but as already mentioned the act of 1504 on falsing dooms does suggest that some pleadable brieves were still being addressed to the justiciar's court at the beginning of the sixteenth century.¹¹³ The appearance of a style for the brieve of mortancestor in the St. Andrews formulary, identical with those in the Ayr and Bute manuscripts and in Quoniam, underlines the point that the argument from relative silence can cut both ways.¹¹⁴ In the latter part of the sixteenth century, however, neither Balfour or Skene was aware of any difference between the brieve of mortancestor and the brieve of inquest and plainly by their time the true nature and effect of the former had been forgotten.¹¹⁵

113. APS ii 254, c. 41. See above, 199 - 200.

114. St. Andrews Formulare i 253.

115. Balfour, Practicks ii 420 - 33; Skene, De Verborum Significatione, s.v. 'Breve de morte antecessoris'.

(d) The brieve of right

The early history of the brieve of right has been discussed in the previous chapter in which it was argued that there were two forms in the thirteenth century closely comparable to the writs de recto and praecipe in capite in use at the same period in England in that one was available only to those holding of the king and the other only to those holding of subject superiors in whose courts the action would be begun.¹¹⁶ But by the fourteenth century, when for the first time styles for the Scottish breve de recto become available to us, a fusion of the two forms appears to have taken place. These styles and the treatises, Regiam and Quoniam, are all agreed that the brieve of right was addressed to the sheriff or to the provosts and bailies of the burgh court, that is, to royal rather than to franchise courts.¹¹⁷ The brieve itself was a command to the addressee to let someone have full right of lands which he claimed to hold heritably of the king but, as already noted, Regiam states that it was also available to one claiming to hold 'of some other lord'.¹¹⁸ The phraseology of the styles is however an indication of the earlier history of two separate brieves.

There are other similar hints elsewhere in the fourteenth century material. Both Regiam and Quoniam stress the minutiae of procedure and pleading on the brieve of right. The law appears to have been in no hurry to cause the defender to compear; he might be cited to

116. See above, 128 - 38.

117. Reg. Brieves 39 (no. 18), 40 (no. 19), 61 (no. 91)
Regiam Majestatem I, 4; Quoniam Attachiamenta ch. 57.

118. Regiam Majestatem I, 9.

appear up to four times before his absence would cost him possession and he could tender three successive lawful essonzies for each non-appearance.¹¹⁹ This is the procedural world of Glanvill and the twelfth century and one which contrasts sharply with that of the actions of dissasine and mortancestor. Had the brieve of right we know from the fourteenth century forms been the original style, some procedural differences from the English writs might reasonably have been expected. As it is, the evidence suggests that the fourteenth century brieve was the result of a rationalisation in the king's chapel of the de facto position, that actions on brieves of right ended up in the royal courts even when begun elsewhere, and that this did not affect the ancient procedural rules for these types of case.

One striking contrast between Glanvill's treatment of the writs of right and that to be found in Regiam, however, is that according to the latter the issue contained in a brieve of right was always put to an assize. There is nothing to suggest that Glanvill's account of trial by combat on the writ of right was regarded as relevant by the compiler of Regiam.¹²⁰ The pursuer's statement of claim would ask for an assize if the defender denied his claim and, if the defender had no relevant exception to plead, the question would then be put to 'twelve lawful men of the neighbourhood or of the court'.¹²¹ It has recently been persuasively

119. Regiam Majestatem I, 5 - 10; Quoniam Attachiamenta, ch. 40.

120. See Neilson, Trial by Combat, 106 - 8 for discussion; also Cooper, Regiam, 35 - 8.

121. Regiam Majestatem I, 9 and 11.

argued that combat remained competent on the brieve of right in the fourteenth century¹²² but it must be accepted that at best this was the exception rather than the rule since all cases which are known to have proceeded upon such a brieve were taken before an assize. But if the argument is correct it reinforces the view that the brieve of right's history goes much further back than the earliest references to it in the 1290s.¹²³ Whether or not the 'duels of land' for which George Neilson offered evidence took place on brieves of right,¹²⁴ change and development over a long period seem to underlie what may be termed the mature forms of the fourteenth century.

However this process of change and development seems to have been completed by then. There are only minor statutory adjustments to procedure, which are contained in the 1318 legislation and have been touched upon in the previous discussion of dissasine.¹²⁵ In 1456 departures from the procedural rules for brieves of right led to the nullification of the entire proceedings in a particular case. Reference was made to the books of the law, presumably texts such as Regiam and Quoniam, for authoritative guidance on the law, suggesting little change from the position at the beginning of the previous century.¹²⁶ In 1505 the sheriff-depute of Lanark was sued for wrongous and inordinate proceeding upon a brieve of right, having failed to allow a debate upon an exception proposed by the defenders

122. Sellar, 'Courtesy, battle and the brieve of right', 6 - 8.

123. Stevenson, Documents i 384 - 6; Stones and Simpson, Edward I ii 342 - 3.

124. Neilson, Trial by Combat, 86 - 90.

125. APS i 471, c. 19; and see above, 194 - 5.

126. Aberdeen-Banff Ill. iii 8.

and put the brieve to the determination of an assize.¹²⁷ This looks very much like a point drawn from the Regiam passage mentioned in the last paragraph about putting the case to the assize if the defender had no relevant exception to make. The burgh court of Haddington in 1425 referred a brieve of right to an assize of seventeen men, who took 'the grete ath at thai suld without fraude or favor of ony part determane lely qwilk of the said parties has ful rycht in the sayde tenements', the language of the record here presumably echoing the plenum rectum of the brieve.¹²⁸ In this Haddington case, although the assize was 'lang tyme avisit', the decision seems to have been reached within a day; but to judge from other surviving records, such celerity was unusual. Thus for example in 1317 the defender in a case begun by brieve of right persistently failed to compear, exploiting to the full her right to give essonzies for non-appearance. At the point where the record breaks off the court had given her fourteen days, not to compear, but to arrange a settlement with the pursuers; it was only if this failed that the brieve would be put to an assize of twelve.¹²⁹ Even after the defender had finally been brought into court much time might elapse before a final decision was given. A case in the Aberdeen sheriff court which began in February 1457 was only concluded, after four separate court days, in April.¹³⁰

127. SRO, Acta Dominorum Concilii, CS 5/16, ff. 144 v. - 145 r. (Appendix C).

128. PSAS 2 (1856 - 7) 386.

129. Aberdeen Burgh Recs., 7 - 8, 9, 10, 12, 14 - 15.

130. Aberdeen - Banff Coll. 281, 284; APS xii 25, no. 46; Aberdeen - Banff Ill. iii 318 - 27.

The evidence of the records thus supports the conclusion to be drawn from Regiam and Quoniam that Scots law shared the English reluctance to come to a final decision on the question of right.

Another point upon which practice remained constant in the fourteenth and fifteenth centuries was that of jurisdiction. The brieve of right appears to have been competent only in the sheriff and burgh courts, again showing the accuracy of the formularies and treatises. The earliest case on a brieve of right for which record survives was in Berwick burgh court about 1290, when Master Roger Bartholomew recovered his sasine of certain lands by an assize.¹³¹ The 1317 case mentioned in the previous paragraph was heard in Aberdeen burgh court where also in 1405 a pursuer named John led a brieve of right which instructed the bailies to cause him to have full right of a tenement in the burgh.¹³² Professor W.C. Dickinson printed three manuscript references to brieves of right brought in various burgh courts between 1425 and 1449.¹³³ The first record of a brieve of right in the sheriff court is found as late as 1456, although it can only be due to the ravages of time that there is nothing earlier. The case is one in which Reginald Cheyne sued Henry Cheyne for the lands of Esslemont and Meikle Arnage before the sheriff depute of Aberdeenshire.¹³⁴ In 1457 the same sheriff court was confronted with another brieve of right,¹³⁵ while in 1471

131. Stevenson, Documents i 384 - 6.

132. Aberdeen Burgh Recs., 214.

133. Aberdeen Burgh Recs., cxxv, n. 3, and cxxxv, n. 3. One of these is printed in full in PSAS 2 (1856 - 7) 386.

134. Aberdeen - Banff Ill. 111 8.

135. Aberdeen - Banff Coll., 281.

the auditors of causes and complaints heard how Robert Spens had led 'the process of the breif of richt...tuiching the landis of Kittidy' against James Nory and his son in the sheriff court of Fife.¹³⁶

That this remained the jurisdictional position at the beginning of the sixteenth century is confirmed by the 1504 statute on falsing the doom which mentions that 'the breve of rycht' was pursued before 'the schireff, stewart or balze'.¹³⁷ The 'balze' was presumably the bailie of the burgh court, to whom the brieve of right in burgh was addressed; 'stewarts' were royal officers with a jurisdiction equivalent to that of the sheriff in certain parts of the country such as Kirkcudbrightshire in the south west.

The jurisdiction of the burgh court to hear actions of right is of particular interest, as there is no evidence to show that brieves of dissasine or mortancestor were ever competent there. A comparison with the customs of some of the major boroughs elsewhere in those parts of the British isles under English control is suggestive, for in their courts the writ of right, but not the petty assizes of novel disseisin and mort d'ancestor, seems to have been available.¹³⁸ Glanvill wrote that 'for reasons of convenience' it had been ordained that burgage tenures could not be recovered by mort d'ancestor.¹³⁹ Bracton explained that mort d'ancestor was

136. ADA, 16.

137. APS ii 254, c. 41.

138. See Borough Customs i 251 - 66 and ii, cxix - cxxiv; A. Harding, The Law Courts of Medieval England (London, 1973) 42.

139. Glanvill XIII, 11. See also the editor's note on this passage.

excluded where local custom permitted the purchase of borough lands; land which had been bought could be bequeathed by will and so the heir by the common law rules of primogeniture might be legally kept out. But if lands had descended hereditarily, then a disappointed heir could use the assize.¹⁴⁰ Instead of novel disseisin the English burgess used the assize of fresh force, while the writs of entry appear not to have been used at all. Thus the only one of the English real actions which was always competent in borough courts was that on the writ of right. Its use was flexible: it might for example be brought where in the ordinary courts of the common law mort d'ancestor or formedon in the descender would have been the appropriate writ.¹⁴¹

This is a much simplified picture of the position in the English boroughs and it should be stressed that custom varied from borough to borough and from time to time. The purpose of these generalisations is merely to give a background against which the lack of evidence for dissasine and mortancestor in the Scottish burgh courts may be considered. We know that in burgh as outwith no man could be ejected from his holding without the king's brieve;¹⁴² the Leges Burgorum also tell us that a burgess might dispose of his 'conquest', that is, land he had purchased rather than inherited, as he wished during his life, but that he might not alienate it from his heir on his death-bed.¹⁴³ There is no evidence that he could bequeath any

140. Bracton f. 271 (iii 295); Borough Customs i 243 - 4.

141. Borough Customs i 231 - 42 (fresh force), 255 (right for mort d'ancestor); ii, cxxiv (right for formedon in the descender).

142. Ancient Burgh Laws, 21 (c. 43).

143. Ancient Burgh Laws, 11 (c. 21), 20 (c. 42).

of his lands, conquest or not. In another part of the burgh laws it is declared that he who had been ejected from his possession without proper authority or judgment should be restored before any other claim to the lands was heard.¹⁴⁴ This hints strongly at a possessory action in the nature of dissasine in the burgh courts without actually naming it as such. A fragment found in many of the later legal manuscripts said in gremio to be a statute of Robert I lays down a procedure 'super deforciatione recenti in burgo', whereby he who complained of ejection was to have his case heard immediately upon the debatable ground by an assize, to determine not just the possessory question of ejection and restoration but that of ownership, 'so that he against whom it is decided shall never be heard thereupon afterwards'.¹⁴⁵ Whether or not this truly is legislation of Robert I, two cases of 'recens deforciammentum' were heard before assizes in Aberdeen burgh court in 1399.¹⁴⁶ There is no trace in the printed records of that court of briefes of dissasine or mortancestor. Both deforcement cases proceeded upon the pursuer's complaint and giving of caution rather than upon royal brieve, so that this action seems to have been an exception to the general requirements of litigation to recover land. Perhaps the critical point about the assize was that the deforcement had to be recent, so that when that was not the case action by pleadable brieve under the normal rule became necessary.

144. Ancient Burgh Laws, 48 (c. 99); also 168.

145. APS i 721, c. 12 (see also APS i 722, c. 13); Ancient Burgh Laws, 165 - 7.

146. Aberdeen Burgh Recs., 65, 117.

This material does not suggest that the Bractonian explanation for the exclusion of mort d'ancestor in boroughs helps us to understand what the position was in Scotland, although Regiam does repeat Glanvill's remark that it had been enacted for reasons of utility that burgage could not be recovered by mortancestor.¹⁴⁷ It is not however inconsistent with the suggestion that burgages could only be recovered by brieve of right or, where appropriate, the action of recens deforciamantum. Perhaps the best evidence to support this theory is to be found in the fact that the brieve of right in burgh was given a place in the formularies separate from the brieve of right addressed to the sheriff.¹⁴⁸ Moreover, looking at the words of the brieve, it could have been used to remedy situations where outwith burgh brieves of dissasine or mortancestor would have provided the answer. The brieve stated that the pursuer claimed to hold lands heritably of the king and to have been deforced of them by the defender. Such words were perfectly applicable to a dissasine or to a claim for recovery of the lands of an ancestor by heritable right, even though it is not possible to say whether in fact the brieve was used in this way. But it is at least a plausible hypothesis that the scope and function of the brieve of right in burgh was wider than its equivalent in the sheriff court because the burgess could not use either dissasine or mortancestor.

The accumulation of information about jurisdiction also enables us to suggest that certain cases involving brieves may well have been

147. Regiam Majestatem III, 25.

148. Reg. Brieves, 40 (no. 19). Note also that some versions of Quoniam refer to the breve de recto in burgo rather than the breve de recto.

ones touching 'full right' rather than dissasine or mortancestor. The mid-thirteenth century case in the sheriff court at Traquair whereby Mariota claimed an apparently heritable right to the lands of Stobo 'per litteras regias' against the bishop of Glasgow is the earliest example of this, but given the possibility already discussed that mortancestor may also have been competent to the sheriff at this time, the fact that the case was heard in his court is inconclusive.¹⁴⁹ A case before the sheriff of Inverness in 1454 is more likely to have been begun by brieve of right. The pursuer established his rights to certain lands against a defender whom he had 'lachfullie followyt be brevis of law of our soveran lordis the kingis chapell'.¹⁵⁰ At this date the only pleadable brieve by which land could have been recovered before the sheriff was the brieve of right, so it seems that this must have been such a case.

Another interesting case is recorded in a document of 1354 which narrates the history of the lands of Esperston, Midlothian. Probably in the reign of Robert I a man named William Cook used 'litteras regis in forma capelle' to recover the lands, from which his mother had been forcibly expelled perhaps thirty years previously. The case was heard before the sheriff of Edinburgh with a jury and it was found that William was the son and nearest heir of his mother and that she had been vest and saised of Esperston for many years before her expulsion. The document describes the brieve as being super iure rather than de recto and makes no mention of any defender (although the

149. Glasgow Registrum nos. 130, 131; see Barrow, Kingdom, 115 - 6 and above, 204.

150. Family of Rose, 46.

estates may have been in the possession of the knights of the Hospital, successors in title to the Templars who had ejected William's mother).¹⁵¹ It is therefore possible that the brieve was merely one of inquest; but if the Hospitallers were in possession then it is certain that William's remedy would have been a brieve of right. He himself had not been dis-saised so a brieve of dissasine was of no use. The basis of his claim was heritable right. The ancestor from whom he derived that right was within the degrees of relationship which permitted action upon the brieve of mortancestor, but she unfortunately had not been in possession at the date of her death. Accordingly only the brieve of right would have enabled William to regain the lands. The case neatly illustrates the way in which, outside the burghs at least, the choice of remedy was dictated by the facts and circumstances of one's claim and how the scope of each brieve could be determined by the others available.

Most of the other cases of which the details can be worked out also concerned parties who were closely related. Thus the lands claimed by brieve of right in Aberdeen burgh court in 1317 had belonged to a certain Brice Craigie. The defender was his daughter Emma, described as 'an orphan and girl under age' (i.e., of majority);¹⁵² the pursuers were Emma's sister Marjorie and her husband John son of Laurence. Almost certainly the Reginald and Henry Cheyne who were respectively pursuer and defender under a brieve of right in 1456 were

151. See G.W.S. Barrow, 'The aftermath of war', TRHS 5th ser., 28 (1978) at 112 - 14, discussing a document printed by J. Edwards, SHR 5 (1908) 13 - 25 where the especially relevant passages are at 24 - 5. Edwards' own editorial comments on the case may be disregarded. On the succession of the Hospitallers to the Templars' lands in Scotland from 1314 see The Knights of St. John of Jerusalem in Scotland, xxx - xxxiv (where the Esperston case is referred to).

152. Aberdeen Burgh Recs., 14.

brothers.¹⁵³ The lands in dispute, Esslemont and Meikle Arnage, both near Ellon, Aberdeenshire, had been granted to Henry by his father John Cheyne lord of Straloch in April 1441. In a document recording the grant John stated that 'giff it hapenis of case me or any of myn ayris to make any clame or move any question or again calling of this infetment, I oblyse me and myn ayris' to pay five hundred pounds to Henry.¹⁵⁴ Thus it seems that Henry was not his heir. In 1450 Henry entered a suitor for the lands at Aberdeen sheriff court despite a protest 'for the son and heir of Reginald Cheyne'.¹⁵⁵ A Reginald Cheyne is designed of Straloch in July 1475, and it was probably his son and heir, John Cheyne of Straloch, who sued the still-surviving Henry before council in 1493 in another dispute about Meikle Arnage.¹⁵⁶ These fragments suggest that the Reginald who sued in 1456 was the heir of Straloch, being most probably Henry's elder brother. The defender to the brieve of right raised by James Skene in 1457 was the niece of his cousin William Keith the first earl marischal. Finally the defenders to the brieve of right raised by Robert Spens in Fife sheriff court in 1471, James and Robert Nory, were respectively the husband and son of his niece Christian Spens.¹⁵⁷

The closeness of these relationships shows that under a brieve of right parties were not necessarily examining competing titles from their origins at some remote date in the past; indeed, as we shall see,

153. See Cheyne, Cheyne Family, 52 - 6.

154. Aberdeen - Banff Ill. iii 6 - 7.

155. Aberdeen - Banff Ill. iii 7 - 8.

156. Aberdeen - Banff Ill. iii 11; ADC i 281.

157. W.D.H. Sellar, 'Spens family heraldry', Notes and Queries of the Society of West Highland and Island Historical Research 22 (1983) 21 - 27 at 26.

the pursuers in the cases mentioned in the previous paragraph probably went no further back than the titles of their fathers. This is obvious in the case of the Craigie sisters where the question seems to have been which of them was entitled to inherit from father Brice. Was the brieve of right used because the brieve of mortancestor was not available in burgh? In 1456 the origin of the title in dispute between Reginald and Henry Cheyne was the grant of Henry's father in 1441. The grant could only have been challenged by brieve of right. Reginald could not have used mortancestor because his ancestor had not died vest and saised of the lands in question. The case of Spens and Nory is less clear, but it has been suggested that the pursuer was a younger son whose eldest brother had predeceased and who may have claimed the lands in issue, Kittedie in Fife, under a settlement in favour of heirs-male. His brother had left two daughters who as heirs-general also laid claim to Kittedie with the support of their husbands.¹⁵⁸ Spens' action by brieve of right was part of this contest. It seems to follow that he had not had possession of the lands previously since then his action would have been one of dissasine, and that, if he was a younger son he could not use the brieve of mortancestor, since he was not the nearest lawful heir. Finally, if indeed Spens derived his claim from a tailzie in favour of heirs-male, then his use of the brieve of right rather than mortancestor would also have been made necessary by the act of 1430 laying down that the latter action protected only heirs of line and not those whose claim depended entirely upon such tailzies.¹⁵⁹

158. Sellar, 'Spens family heraldry', 26 - 7.

159. Dickinson, 'The acts of the parliament', 5; above, 210 - 214.

Even where, as in the case of Skene and Keith, the parties were not so closely related, the pursuer went no further back than his father to establish his hereditary right. Sometime before the battle of Harlaw in 1411 it would seem that Adam Skene borrowed money from his father-in-law, William Keith the marischal, on the security of his lands of Easter Skene. Adam was killed at Harlaw and was succeeded by his son James, who was to be the pursuer of 1457. Easter Skene had still not been redeemed by the Skenes in 1446, by which time the deeds recording the impignoration had been lost. Accordingly it was necessary for the Skenes to obtain the depositions of elderly witnesses who could recall the transaction and the subsequent acknowledgements of its nature by the Keiths. Ten years later the Skene claim had still not been satisfied, for yet another witness's deposition had to be obtained. This was presumably a prelude to James Skene's action by brieve of right in the early months of 1457. The defender then, Janet Keith, had come to the lands by virtue of a grant from her ~~uncle~~ William, who himself would have inherited them through his father and grandfather (to the latter of whom the lands had originally been granted).¹⁶⁰ Again therefore the pursuer's claim was derived from his father, but because the father had not died vest and saised of the lands in question it was necessary to sue by brieve of right rather than by mortancestor.

160. See Aberdeen - Banff Ill. iii 318 - 23. The story is told in W.F. Skene, Family of Skene, 15 - 22.

What then was the nature of the 'right' claimed by a pursuer under the briefe? In this chapter reference has already been made to the Regiam passage which states that as mortancestor touches fee and freehold it exceeds dissasine, which touches only freehold. It goes on to say that the briefe of right exceeds both these forms of action 'because it touches fee and freehold and just right' and that 'this is why one can recover lost land (terram amissam) by briefe of right and not by briefe of mortancestor or of novel dissasine.¹⁶¹ The direct inspiration of thirteenth century English theories about the relationship of the real actions lies behind this passage. The writ of right represented the pinnacle of the various remedies open to a dispossessed landholder. He who was put out by another had novel disseisin; he who was prevented from taking up the holding of certain close relatives had mort d'ancestor. But the intruder ejected by virtue of one of these writs was not thereby excluded for ever from the lands, for the actions were merely possessory in nature. He could re-open the question by a writ of right, a proprietary as opposed to a possessory action which alone could settle the question of ownership permanently. Thus one could distinguish various types of interest in land, each protected by a different form of action. There was the status of possessor, guarded by novel disseisin; the entitlement to inherit from one's close relatives in possession, enforced by mort d'ancestor; and ultimately ownership, protected by the writ which went 'highest in the right'.¹⁶² It is this pyramidic structure into which Regiam

161. Regiam Majestatem IV, 40.

162. See Pollock and Maitland, History of English Law ii 74 - 5.

strives to fit the Scottish real actions.

The relationship of this juristic structure, the division of actions into categories of possessory and proprietary, to real life has been challenged by modern English legal historians.¹⁶³ Already in this chapter it has been argued that the briefes of dissasine and mortancestor cannot be characterised as possessory in any simple or straightforward way, certainly not in particular to contrast them with proprietary actions. It seems unlikely that a party losing an action begun by one or other of them could have reversed the result by raising a new action with a brieve of right. The main distinction between dissasine and mortancestor in practice seems indeed, as Regiam itself suggests, to have been the kind of interest in land which was the minimum that a pursuer had to show: in the case of dissasine, sasine of a freehold, in mortancestor, a right to inherit from one of a narrowly defined group of relatives. The brieve of right seems to have been used in cases where for some reason these two actions were not available, rather than because the parties were anxious for a final determination of where ownership lay; it was not a more proprietary action than mortancestor and it could be used to recover what one had formerly held so long as that holding had been based on a heritable rather than a mere freehold title.

Chapter nineteen of the 1318 legislation treats the briefes of dissasine, mortancestor and right together in laying down that the defender was to be afforded a full statement of the case against him;¹⁶⁴

163. By e.g. Milsom, Historical Foundations, 122 - 4.

164. APS i 471, c. 19.

surely this is because practical men of the time looked at them in this way, as means of vindicating claims to land from which a prospective pursuer made his choice according to the facts from which his grievance sprang. If in 1433 the brieve of dissasine could reach back into history to a time seventy years previously,¹⁶⁵ then it explored the origins of a current title further back than was done in any of the cases on the brieve of right of which we know. Even before 1318 and the reforms that year relating to the brieve of dissasine it must have seemed very similar to the brieve of right in its operation, for prior to that time, as we have seen, even if the current tenant had not been the original dissaisor he might still be the sole defender named in the brieve. In that state of affairs all that can have differentiated actions of dissasine and right was that the former had to be brought during the lifetime of the original dissaisor and some procedural rules.

In the last section of this chapter we shall examine another aspect of this question, the original function of the brieves and the continuing significance of those functions in the period of their maturity. The final point to be made here is to affirm Sheriff McKechnie's conclusion that the brieve of right remained a familiar form of action for the recovery of lands into the sixteenth century - so familiar that it could be made the subject of allusion in contemporary poetry. Dunbar's "Fasternis Evin in Hell" contains the following lines:¹⁶⁶

165. As in Coupar Angus Chrs. ii no. 128.

166. The Poems of William Dunbar ed. J. Kinsley (Oxford, 1979) 153, lines 103 - 108. The poem was probably written in 1507: see 335 - 6.

Na menstrallis playit to thame but dowl,
 For glemen thair wer haldin owt
 Be day and eik by nicht -
 Except a menstrall that slew a man;
 Swa till his heretage he wan
 And entirt be breif of richt.

That the reference to the brieve of right in the 1504 act on falsing the doom¹⁶⁷ touched current practice is confirmed by the mention made in the acts of council for February 1503 of the brieve of right brought against the late William Baillie of Lamington by his namesake of Bagby to recover the lands of Hoprig and Panestone¹⁶⁸ as well as by the case of 1505 before the sheriff depute of Lanark discussed earlier.¹⁶⁹ There is a style for the brieve of right in the St. Andrews formulary identical to those in the fourteenth century registers of brieves¹⁷⁰ and examples of its use within the city and regality of St. Andrews may also be found in occasional references in the acts of council.¹⁷¹ Although there are no cases involving brieves of right in the earliest surviving sheriff court books, those for Fife from 1515 to 1522, this need not mean that the brieve had suddenly gone out of use. As late as 1541 land was being recovered by royal brieves before the sheriff of Renfrew.¹⁷² Although the brieves are not identified, it is possible

167. APS ii 254, c. 41.

168. SRO, Acta Dominorum Concilii, CS 5/13, ff. 35 r. - 36 r.

169. SRO, Acta Dominorum Concilii, CS 5/16, ff. 144 v. - 145 r. (Appendix C).

170. St. Andrews Formulare i 254.

171. SRO, Acta Dominorum Concilii, CS 5/12, f. 129 v. (8 February 1502/3) and ff. 152 r. - 153 r. (10 February 1502/3).

172. Fraser, Lennox ii no. 149.

that they were de recto. But like mortancestor the brieve of right clearly ceases to be of practical importance during the first half of the sixteenth century.

(e) Conclusions

It has now been shown that the brieves of dissasine and mortancestor survived alongside the brieve of right as remedies for the recovery of land from intruders much longer than has hitherto been supposed. So far as can be told, the styles for each of the brieves remained the same in the fourteenth and fifteenth centuries as found in Quoniam Attachiamenta and in the 'registers' of the Ayr and Bute manuscripts. To some extent however these styles may have been the product of a course of development in the thirteenth century. The mature form of the brieve of right combined features of two English writs, the praecipe in capite and the breve de recto, and may have been an amalgamation of two equivalent but earlier Scottish brieves, one for tenants-in-chief of the crown taken in the sheriff and burgh courts and like the praecipe in capite, the other for those holding of subject superiors, taken in the court of that superior and like the breve de recto. The brieve of dissasine in the registers and Quoniam states that the defender dissaised the pursuer unjustly and without a judgment, but we know before 1318 it was competent to use the brieve against one infeft by the dissaisor after the dissasine. It would seem hard to stretch the words of the brieve in the formularies to cover this situation, so possibly here is evidence of a modification of the thirteenth century form. Both dissasine and mortancestor are said by the formularies to pertain to the justiciar's court; this is correct for the fourteenth and fifteenth centuries, but once again, in the thirteenth century there is evidence to suggest that the sheriff had jurisdiction over such actions as well.

All this shows clearly, even given the fragmentary nature of the evidence, the importance to Scotland of the model provided by the developing English writ system of the twelfth and thirteenth centuries. If we follow Professor Harding, we find the origins of the Scottish *briefes of right* in twelfth century royal orders to do right. On these, following George Neilson, combat may have been the method of proof. Towards the middle of the thirteenth century, the *briefes of dissasine and mortancestor* were introduced, providing speedier recovery of lands and determination of issues by recognitions of good and faithful men in the royal courts. This is the chronology of developments in England and there can be no doubt that what happened in Scotland was a case of legal transplantation. But the further question remains, why did this occur? In particular, why were the actions of *dissasine* and *mortancestor* appropriated for use in Scotland? It has usually been thought that the answer lies in the fact that the greater Scottish landholders became acquainted with the advantages of the English *assizes* for the recovery of land as owners of property in England and pressed successfully for their introduction in Scotland.¹⁷³ But such a view is not easy to reconcile with the conclusions of Professor Milsom in his important work on the early history of novel *disseisin* and *mort d'ancestor*.¹⁷⁴ He argues that to begin with both actions were really attempts to curtail abuse by lords of their powers of control over their tenants and the lands which those tenants held of them. Thus a tenant was enabled to sue the lord who put him

173. See e.g. Barrow, Kingdom, 114.

174. See especially his Legal Framework of English Feudalism and, more concisely, chs. 5 and 6 of Historical Foundations.

out without cause or due process by bringing novel disseisin in the king's court. The lord whose tenant died had to put in that tenant's heir or else be liable to an action of mort d'ancestor. While therefore the assizes protected freeholders, they were not necessarily amongst the greater magnates of the realm. There is no doubt that in England these actions were used by tenants against their lords and it looks as though this also happened in Scotland. Thus the act of 1230 which apparently introduced the briefe of dissasine begins, 'If any man complains to the lord king or his justiciar that his lord [emphasis supplied] or any other has dissaised him unjustly and without a judgment ...' When in 1253 Emma of Smeaton brought a briefe of mortancestor against Dunfermline abbey to recover lands which had belonged to her father, she was in fact suing the superior of whom her father had held the lands.¹⁷⁵ Some of the other early cases involving briefes are also interesting in this regard, in particular the one in which Eda, Mary and William of Paxton sought to regain their right of estovers in the wood of Restonside against the priory of Coldingham. In English law, estovers was the right of a tenant to take wood from his lord's estate so far as necessary for the repair of houses, hedges and agricultural implements.¹⁷⁶ This is clearly what is meant by estovers in our case, where the pursuers were allowed reasonable estovers for the construction of houses, hedges and ploughs, and seem to have held their lands of Paxton as vassals of the priory.¹⁷⁷ Another document allows us to see that other tenants

175. See Dunfermline Registrum nos. 180, 185, 194, 195 and 303.

176. Holdsworth, History of English Law iii 143 and vii 306, 315.

177. Durham Dean & Chapter Muniments, misc. ch. no. 1263 (Appendix A); Raine, North Durham no. 357.

of the priory also enjoyed such estovers in Restonside.¹⁷⁸

Professor Milsom has argued that the use of novel disseisin to protect such rights of common shows the action's 'feudal orientation', because typically the common, whether it was a pasture or a wood or some other, would be controlled by the lord.¹⁷⁹ Clearly there is just such an orientation in this estovers case.

A claim by a tenant against a lord to a right of common may also lie behind the action, perhaps one of mortancestor, which Mariota daughter of Samuel brought against the bishop of Glasgow concerning the lands of Stobo. Stobo had been part of the bishop's demesne from very early times,¹⁸⁰ and it is described as his manor (manerium) in this dispute with Mariota.¹⁸¹ Between 1208 and 1214 a neighbouring landowner claimed common of pasture in Stobo¹⁸² and there may have been another such claim in the 1220s.¹⁸³ There is at least a chance that this was also what Mariota sought. The feudal or seignorial dimension is clearer in the case where Mariota of Chirnside and her son Patrick sued the priory of Coldingham for a ploughgate at Renton. Patrick's father Richard (who was presumably Mariota's husband) is designed 'of Renton' in the record of the case. Lands in Renton would

178. Raine, North Durham no. 418. 'Estovers' seems also to have been used in medieval Scotland with the wider meaning of 'necessaries, maintenance, support'. See references in Du Cange, Glossarium Mediae et Infimae Latinitatis and Skene, De Verborum Significatione, both s. v. 'estoverium'. For an example of the use of the word in this sense in a document of 1238 see Arbroath Liber i no. 261.

179. See his introduction to Pollock and Maitland, History of English Law i, xlii - xliii; also Milsom, Legal Framework, 13.

180. See Glasgow Registrum, 5, 7, 23, 30, 43, 50 and 55.

181. Glasgow Registrum no. 131.

182. Glasgow Registrum nos. 104 and 105.

183. Glasgow Registrum nos. 126 - 128.

have been held of the priory.¹⁸⁴ If this was a case of dissasine, what we may be seeing is a dispossessed tenant and tencer suing their lord to get back into their lands. A clear case of a lord being sued by his tenant, perhaps for dissasine, is the action of Gilbert against the earl of Lennox for the lands of Monachkenneran in 1235. There is perhaps also a feudal dimension in the legislation of 1318. The dissaisor who put one person out of and another into sasine of a tenement would most typically be a lord exercising control over his tenants, while the group of dissaisors could conceivably be the lord's court, or following, or officers, with the principal dissaisor being the lord himself or his steward.¹⁸⁵

That these briefes were used against lords is not of course conclusive evidence that they were created for that purpose. Professor Sutherland has argued against Professor Milsom that the main aim of Henry II and his advisers when introducing the petty assizes in England was to give better legal protection to all freeholders against dispossession from whatever source, lordly or otherwise.¹⁸⁶ To some extent the argument really turns on the extent of lords' powers in late twelfth century England and on whether freeholders had any meaningful rights outwith their lords' courts before the introduction of the grand jury and the petty assizes. It is Professor Milsom's very persuasive point that these institutions effectively created their rights. Now in Scotland we know extremely

184. Raine, North Durham nos. 375 - 387.

185. See Milsom, Legal Framework, 18 - 21. It is of course also possible, given the background to the 1318 act, that the group of dissaisors envisaged was an army!

186. Sutherland, Novel Disseisin, 30 - 1.

little of the powers of lords in their courts. All we can say is that the act of 1230 (a date long after the assizes had lost their feudal orientation as a primary feature in England), while it refers to lords as perhaps the prime examples of likely dissaisors, does not restrict the operation of the remedy to such cases, but states that it will operate whenever one is dissaised by another unjustly and without a judgment. And if we can take the 1318 legislation as a retrospective guide to the development of the law in the thirteenth century then the person dissaised could and did bring the action directly against one infeft in the land in all good faith after the original dissasine. There was hardly likely to be any existing tenorial link in the land between such parties. Thus even before the act of 1318 the brieve of dissasine was much more of an assertion of an abstract right to land against the equally abstract title of some other person. This remained the position under the act of 1318, as we have already seen.

When we look at the fourteenth and fifteenth century cases it is harder to find any feudal dimension. Most of the cases of dissasine seem in fact to be contests between tenants-in-chief of the crown rather than between tenants and lords, and to be about rights in land rather than the recovery of possession. Thus in 1341 the abbey of Arbroath received royal confirmation of its title to the lands which it was about to recover by brieve of dissasine. After their recovery the abbey leased out the lands as it had been doing since the middle of the thirteenth century. Perhaps the dissaisor Mowbray was a tenant who had stayed on the lands at the

expiry of his lease.¹⁸⁷ The dispute between the portioners of Fithkil (now Leslie in Fife) and Dunfermline abbey in 1319 again involved rights of common in the lands of Goatmilk and Caskieberran (now in Glenrothes, Fife, just opposite Leslie across the river Leven) in Fife. But there would appear to have been no tenurial link between the parties. Rather both had rights and the question concerned their mutual extent. The boundaries within which each could exercise his rights were initially determined by a brieve of perambulation, but clearly the result left the portioners with a smaller area than they had expected. The brieve of dissasine seems therefore to have been brought to claim ejection from ground in which they claimed common rights and to be essentially a dispute between neighbours. Interestingly it was held that the matter could not be reopened in this way. The case of Hay of Loquhariot and William Borthwick in 1368 was also a dispute between neighbours about rights in adjoining lands. The lands under dispute were those of Middleton, which lie all around what are today the farm of Loquhariot and the village of Borthwick in Midlothian. The evidence shows that the two families were constantly at odds about each other's rights in Middleton and the brieve of dissasine raised by Hay in 1368 was clearly only an incident in a long story about the definition and extent of those rights.¹⁸⁸

187. See Arbroath Liber i nos. 247 and 311 for thirteenth century leases of the lands; RRS vi no. 29 (Arbroath Liber ii no. 17) for royal confirmation of 1341; above note 29 for case of dissasine; Arbroath Liber ii no. 19 for subsequent lease. The lands were again in dispute in the 1350s: RRS vi nos. 124, 133, Arbroath Liber ii no. 27. See also RRS vi nos. 13 and 182.

188. See RMS i app. 2 nos. 31, 385, 389; Yester Writs nos. 21, 23, 37, 39, 41A, 42 - 51, 68A, 70A and 106.

Similarly the cases of mortancestor often look as though they are about abstract questions of title and right to lands rather than being merely a remedy for disappointed heirs against wrongdoing lords. We can see this sometimes in the language of our records: it is the droit of a barony which will be settled by a brief of mortancestor in 1369,¹⁸⁹ and it is complementum iuris which the pursuers seek under another such brief in 1397.¹⁹⁰ Where the background to a case can be worked out in any detail, it is generally a title competition which is laid before us. Take for instance Hay the constable against Keith the marischal in 1390 for the lands of Innerpeffray. Hay's claim was based on the sasine of his grandfather John Keith. John's daughter, who must have been his heir, married Hay's father. But sometime after 1324 we find Robert Keith, the then-marischal and head of the family, entailing Innerpeffray to his heirs-male after the death of his son John (the same John Keith?). Thus the lands passed to his brother Edward who in turn was succeeded, sometime before 1351, by his eldest son William, the defender of 1390. No doubt the Keith claim is explained by the strength of feeling in favour of agnatic succession in Scotland. Its illegality is easy for us to see; it would perhaps have been less obvious in 1390 when William was holding by a title over sixty years old which had been the subject of a royal confirmation.¹⁹¹

189. Morton Registrum ii no. 107.

190. Aberdeen - Banff Ill. iii 263.

191. RMS i app. 1 no. 47; Scots Peerage vi 30 - 8.

But none of this means that the briefes had ceased to operate in a feudal context. There was no Quia Emptores in Scotland and in the fourteenth century the pivotal role of the lord or superior in the transfer of land, whether by succession, subinfeudation or substitution, was, if anything, strengthened. Heirs had still to seek entry and receive sasine from him, while the consent of the superior to a conveyance inter vivos was made even more important by a series of statutes defining his right to recognosce, or take back into his own hands, lands which had been the subject of unlicensed alienation by his vassal. Conveyancing was thus usually by resignation in favorem followed by a re-grant, or by confirmation.¹⁹² That the exercise of these powers of control might give rise to a claim under either of our briefes is suggested by two statutes of 1401,¹⁹³ one of which deals with the difficulty experienced by heirs who often find that the lord has infeft someone else, and the other of which speaks of 'wilful and secret' recognitions by lords which vex the lieges in their heritage. Mortancestor and dissasine respectively would have provided remedies against such seignorial wrongs, although they are not mentioned in either of the statutes. Even later, in 1466, when Gilbert lord Kennedy brought a brief of mortancestor against Robert lord Fleming, he was seeking to recover lands which his ancestors had held of the Flemings;¹⁹⁴ it is significant that to begin with the parties seem to have contemplated

192. See Grant, 'Higher nobility in Scotland', 197 - 211.

193. Both at APS i 575.

194. SRO, Ailsa Muniments; GD 25/1/9, 14, 20, 24, 31, 59, 97 - 105; Wigtown Charter Chest nos. 25 - 42, 413, 414; RMS ii no. 874.

action in Robert's court.¹⁹⁵ Here then the question seems to have been, was Robert entitled to the lands in demesne, or only to a superiority over them? Moreover, even when there was no tenurial link claimed between the original parties in a case of mortancestor, a feudal dimension could come in if the defender called a warrantor. It would seem from a writ in the Bute manuscript that this would sist the principal action until the warrantor appeared to take over its defence;¹⁹⁶ there is here a significant contrast with the position in dissasine. Often the warrantor must have been the superior and the pursuer's case would then become a claim to hold the lands of him. At least this is what we can see happening in a case of 1372 where James Douglas of Dalkeith, who had been impleaded in the justiciar's court for his lands of Morton in Dumfriesshire, brought a brieve of warrandice against the earl of March in the sheriff court.¹⁹⁷ The earl, who had granted the lands to be held of him by Douglas only a few years before,¹⁹⁸ accepted his liability to appear before the justiciar. It seems almost certain that the case in that court was one of mortancestor and that it would now become a question of the pursuer's right to hold of the earl.¹⁹⁹

195. SRO, Ailsa Muniments, GD 25/1/97.

196. Reg. Brieves, 61 (no. 96).

197. Morton Registrum ii no. 130.

198. Morton Registrum ii nos. 100 and 101 (see also nos. 136, 141, 142); RRS vi no. 105.

199. For a case of 1465 where the defender in an action begun by brieve of mortancestor had it sisted to enable him to call his warrandice (unsuccessfully) see SRO, Lord Advocate's Department, AD 1/60 (Appendix D).

Professor Sutherland has used the English material for the fourteenth and fifteenth centuries to show how in that period the assize of novel disseisin became the principal vehicle by which title might be tried, before ultimately it was superseded by trespassory actions. By contrast the assize of mort d'ancestor fell into obsolescence, along with the writs of right and of entry.²⁰⁰ The picture is very different in Scotland, where the brieve of dissasine co-existed not only with the brieve of mortancestor but also with the brieve of right. Thus a Scot who had a right to enter land without ever having had sasine did not need to bring dissasine against the intruder as did his English counterpart. The Scot could use mortancestor if his right of entry was derived from a deceased relative within the relevant degrees, or the brieve of right if his claim was from a more remote ancestor. If the ancestor had been ejected before his death, or had surrendered the lands unjustly, so that it was not possible to say that he had died vest and saised, then again he would have resort to the brieve of right. It is probably safe to say that dissasine remained a remedy for one who had had sasine properly speaking, that is, had been infeft, and had been put out by someone still alive. If the dissasine had been committed by one who had since died, then presumably the ejected person would usually turn to the brieve of right.

The scope of the brieve of right can therefore be seen as largely determined by that of the brieves of dissasine and mortancestor. It was the general as opposed to the specific action for the recovery

200. Sutherland, Novel Disseisin, chs. 4 and 5.

of lands, used where other forms of action would for some reason be inappropriate. There is no sign of any equivalent of writs of entry in Scottish practice, but we can see the *briefe of right* being used in situations where in England such a writ would have provided the remedy. The most striking example is James Skene's action against Janet Keith to recover lands which his father had granted away to her great-grandfather in security of a debt. This would have been a case for the breve si heres petat quod antecessor dimisit ad terminum in England, a variant on the very first writ of entry, ad terminum qui praeteriit, according to Bracton; the case would however most likely have been decided by a recognition as to whether the tenant Janet held the lands in fee or gage.²⁰¹ Similarly Reginald Cheyne raised a *briefe of right* to complain of his ancestor's grant to another; as Maitland pointed out, most of the developed writs of entry were about 'alienations made by someone who, though he was occupying and rightfully occupying had no power to alienate'.²⁰² Here he was echoing Bracton's remark that the writs lay 'against all who have their entry through those who transfer without having a free tenement or the right to transfer'.²⁰³ In Scotland, it is submitted, the *briefe of right* covered the whole field of the writs of entry to permit attacks on flaws in the titles of current tenants. It would certainly have been the remedy to meet a case of entry sur disseisin where the dissaisor or dissaissee had died before recovery could take place by the *briefe of dissasine*.

201. Bracton f. 321 (iv 30). For the recognition as to whether lands were fee or gage, see Glanvill XIII, 26 - 7.

202. Pollock and Maitland, History of English Law ii 68.

203. Bracton f. 318 (iv 21).

This view of the briefe of right as comprehending the writs of entry seems to gain some support from the provisions of the Statute of Wales enacted in 1284.²⁰⁴ This imported the current English writ system in conquered Wales but, as already noted in an earlier chapter, with only a single writ, the breve commune, in place of the writ of right and, moreover, no writs of entry. It seems that it was the intention of the legislators that the breve commune should stand alone in their place.²⁰⁵ The reason for the development of the writs of entry in England is currently the subject of a controversy the elements of which may throw some light on their non-appearance in the Statute of Wales and in Scotland. Professor Milsom has argued that writs of entry grew out of writs of right, to enable lords to challenge the entries of those whom they would otherwise be compelled to warrant as their tenants. This was made necessary by the fact that the tenant could only be put out by writ. Using the writ of right the lord had to set up his own title as 'better' than that of the tenant. But that title was really irrelevant in the true dispute, which only concerned the tenant's title to hold of the lord. Accordingly lords sought and gained special clauses in their writs of right for such cases, stating the defect in the tenant's title upon which they proposed to eject him. Such writs became de cursu and proliferated especially after 1215 and clause thirty-four of Magna Carta. The entry clause in the praecipe indicated that the writ would not deprive some other lord of his jurisdiction but would

204. Statutes of the Realm i 60.

205. Smith, 'The Statute of Wales 1284', 141 - 4.

rather enable a lord to get rid of a tenant with no valid title to hold of him.²⁰⁶ That the pre-1215 writs of entry were solely used in cases where there were difficulties in using an ordinary praecipe has been effectively disproved by Professor Palmer, who has also shown that they appeared with an 'upward' - that is, tenant suing lord - as well as a 'downward' orientation. But he does not challenge the theory of the importance of Magna Carta in the increasing use of writs of entry in the thirteenth century and he accepts that some of those then formulated do indeed derive from writs of right.²⁰⁷ Bracton's discussion of the writs of entry shows how closely thirteenth century English lawyers linked them with writs of right. He explains how the party suing by a writ of entry might be forced to shift to the procedure of a writ of right 'because of a very distant entry which cannot be proved by a witness's own sight and hearing but that of another, as the sight and hearing of a father who instructed his son, in which case, because of necessity and the lack of other proof, the tenant must put himself on the grand assize or defend by the duel'.²⁰⁸ Equally a writ of right might become a writ of entry:²⁰⁹

If, though, the writ of right begins to be a writ of entry by the narratio and the demandant puts forward his intentio, supports it and is prepared to prove it by the country, it is still in the election of the tenant whether he wishes to put himself on a jury with respect to such entry or not, since he has three remedies, namely, defending himself by the duel, or putting himself on the grand assize on the right, or on a jury as to the entry. Since it is in the tenant's discretion to elect whichever of these he wishes the writ of right will not become a writ of entry until the tenant elects to defend himself by a jury against the entry.

206. Milsom, Legal Framework, 92 - 102, and Historical Foundations, 143 - 9.

207. Palmer, 'Feudal framework of English law', 1153 - 61.

208. Bracton f. 318 (iv 23).

209. Bracton f. 318 (iv 22 - 3).

The interchangeability of writs of right and entry in England is apparent from these passages of Bracton. Clearly many technicalities of the law and procedure of the forms of action underlie the bifurcation of the remedies, technicalities which so far as can be told did not arise in Scotland. Nor is it possible to detect whether claims in the early brieve of right cases third chapter were either upward- or downward-looking in nature. All but one of those cases heard before franchise courts in the thirteenth century were upward claims by tenants to hold of lords; the nature of the remaining example is an inscrutable mystery.²¹⁰ Only one other case of a brieve of right is known before 1300 and this was heard in the burgh court where feudal elements are unlikely to have been present.²¹¹ Further we have seen that the rule requiring brieves to make freeholders answer for their lands did not inhibit a lord's right to make his tenant 'show his holding', and it would seem from at least one case that he could use this action to reduce the title shown.²¹² Thus one of Professor Milsom's conditions for the development of writs of entry was not present in Scotland. Nor did Magna Carta apply in Scotland to make necessary the addition to brieves of right of explanatory clauses about jurisdiction. So superiors who wished to challenge the titles of their vassals and to proceed by way of brieve of right would not have been confronted with all the technical difficulties which may have led to some of the writs of entry in England.

210. The mysterious case is Fraser, Keir, 197 - 8; the other cases are Raine, North Durham nos. 91 and 296, and Paisley Registrum, 180, 192 and 198. See discussion above, 134 - 6.

211. Stevenson, Documents i 384.

212. See above 143 - 6. The case is that of the Bishop of Aberdeen and John Crab: Aberdeen Registrum i 143 - 55.

Whatever the truth about the origins of the writs of entry, it seems clear that in Scotland their work could have been and probably always was done by the brieve of right. It was in other words the remedy where the complaint was of a wrongful or exhausted alienation to the defender or his predecessor in title. We have also seen its importance in the recovery of burgage or tailzied holdings in circumstances where prima facie mortancestor or perhaps dissasine might have seemed more appropriate. Unfortunately it is not possible to say much of its significance in the feudal structure within which the operation of dissasine and mortancestor has been examined, save that probably an early form was addressed to the lords of franchise courts. Over the period of the later middle ages, however, there can be no doubt of its importance alongside the brieves of dissasine and mortancestor as a remedy to gain lands from intruders.

Two general points conclude this chapter. The material discussed in it surely shows that the traditional picture of these remedies, that of 'an agitated and arid world ... in which malefactors hurry about attacking people, ejecting them from their lands, hoping to get away with obvious wrongs',²¹³ must be set firmly on one side and forgotten. Rather they were used to deal with essentially civil questions which pre-suppose a stable background of law and society, questions about the rights of lords, about entitlement to inherit and alienate and the scope of holdings and about the boundaries of lands. We may never know the contribution which the existence and use of these remedies made to the shaping of that law and that society, but we are safe in assuming their significance and ubiquity throughout the period to the beginning of the sixteenth century. An awareness of this must affect our thinking in considering the jurisdiction of the conciliar courts in questions of fee and heritage.

213. Milsom, Legal Framework, 5.

Chapter Five

Parliament, Council and the Common Law

(a) Parliament, Council General and Common Justice

Perhaps enough has now been said to suggest that the pessimistic view of the institutional arrangements for the administration of law and royal justice before 1500 is unjustified. Quite clearly there existed a structure of royal justice, a system of courts which were not centralised and not dependent for their authority upon the personal presence of the king. It is striking how little change is apparent in these arrangements when it is considered how often the administration of justice appears to have been criticised by contemporaries. The forces of conservatism or of continuity with the past were obviously very strong and deep-rooted.

To leave our picture of royal justice at this would however be to give a false impression, for we have not yet dealt with the king's council acting as a judicial body. This has been the subject of a considerable amount of research because from these activities the Court of Session, the principal court of Scots law from the sixteenth century, took its origins. The story is a complex one and not yet fully understood. The starting point seems to be the exercise of judicial functions in parliament in the fourteenth century. It should be noted that there is little justification for regarding a parliament as merely a feudal court of and for all the king's tenants-in-chief. In Scotland as in England, parliament was basically 'a session of the king's council', afforded by individuals who as tenants-in-chief had a right to attend.¹ It has been suggested that 'the primary purpose of

1. A.A.M. Duncan, 'The early parliaments of Scotland', SHR 45 (1966) 36 - 58, at 47, 51 - 6; A. Grant, 'The development of the Scottish peerage', SHR 57 (1978) 1 - 27 at 18 - 24.

these early parliaments of Scotland was the dispensing of justice',² and this interpretation draws support from late fourteenth century documents which speak of parliament as a time 'at which and in which justice ought to be done to anyone complaining',³ and say that the king should hold one annually 'swa that his subjectis be servit of the law'.⁴ This function of parliament, whether or not that was its primary purpose, was clearly not confined to the provision of remedies for aggrieved tenants-in-chief; any of the king's subjects could bring his complaint there. Whatever the original position, by the reign of Robert I parliament was also summoned 'to do the king's business' and assist him in all manner of political as well as judicial affairs.⁵ Consequently there had developed a practice, of which the first evidence is found in 1341,⁶ of devolving the business of complaints to 'sub-committees', presumably to permit the completion of all work in hand. Parliament was held at most twice a year and had limited time at its disposal; it is in this perspective, one of pressure of business in the time available, not that of a flood of litigants seeking 'central' as opposed to 'local' justice, that the creation of these sub-committees should be seen.

2. H.G. Richardson and G.O. Sayles, 'The Scottish parliaments of Edward', SHR 25 (1928) 300 - 317 at 303; cf. Duncan, 'Early parliaments', 37 - 47, 50 - 51.

3. APS i 557.

4. APS i 573.

5. Duncan, 'Early parliaments', 57 - 8.

6. APS i 513 (Scone Liber no. 168). See A.A.M. Duncan, 'The central courts before 1532', in Introduction to Scottish Legal History, 321 - 340 at 324 - 7 on further developments of this practice in the fourteenth century.

It is of course true that Scottish parliaments were courts, opened by the procedures of fencing and calling of suits and having a supreme appellate jurisdiction over all other courts as well as competence to try those charged of treason;⁷ but it is also important to observe that parliament was an occasion to deal 'with that which concerns common justice' (my emphasis). This included the falsing of dooms, as well as 'questions and other complaints which ought to be ended, discussed and determined by parliament'.⁸ The phrase 'common justice' takes on significance when we see parties who have complained to parliament being told to sue elsewhere at common law. For example in 1368 Robert Stewart lord of Menteith was told that the action he had brought in parliament should be pursued and defended in another court according to the order and form of the common law, the defender having contended that the case should be heard in the justiciar's court by the custom of the realm.⁹ Similarly in 1401 Marjorie Lindsay was sent to the common law regarding certain matters not central to a complaint for which parliament had given her a remedy.¹⁰ There is an obvious parallel here with English parliamentary practice of the fourteenth century when, according to a document of 1309, the most important class of petitions to parliament concerned grievances which it was claimed

7. See P.J. Hamilton-Grierson, 'The appellate jurisdiction of the Scottish parliament', SHR 15 (1918) 205 - 222; R.K. Hannay, 'On "Parliament" and "General Council"', SHR 18 (1921) 157 - 170 at 158 - 160; Duncan, 'Central courts', 328, 340.

8. APS i 507.

9. APS i 505.

10. APS i 582; Morton Registrum i app. no. 12.

could not be redressed by the common law nor in any other manner save by special warrant. Where however parliament determined that a petitioner had an action at common law he would be sent to that remedy rather than given one under his petition.¹¹ So when Scottish parliamentary records refer to 'common justice' as a major concern of parliament, we should understand by that something distinct from its 'common law' jurisdiction. In dealing with the complaints of the king's subjects parliament was a court for justice out of the ordinary course of law, justice not obtainable by the processes of the common law.

Alongside parliament in the later fourteenth century we find the institution of the 'council general'. Professor Hannay carefully distinguished the two bodies in a series of articles in the Scottish Historical Review.¹² Council general was also a meeting of the estates, affording the king's council, but of lesser numbers and called together on a summons shorter than that of forty days by which a parliament was convened. Perhaps for reasons connected with the shorter summons council general does not appear to have acted regularly as a judicial body, although it can be seen handling some complaints in 1385.¹³ It is important therefore to

11. H.G. Richardson and G.O. Sayles, Parliaments and Great Councils in Medieval England, (London, 1961), 37; A. Harding, 'Plaints and bills in the history of English law, mainly in the period 1250 - 1350', Legal History Studies 1972 ed. D. Jenkins (Cardiff, 1975), 65 - 86 at 80.

12. 'On "Parliament" and "General Council"', cited above note 7; 'General Council and Convention of Estates', SHR 20 (1923) 98 - 115; 'General Council of Estates', SHR 20 (1923) 263 - 284. See also two articles of A.A.M. Duncan: 'Councils general 1404 - 1423', SHR 35 (1956) 132 - 143; 'Central courts', 325 - 8.

13. APS i 552 - 4.

distinguish these councils general from the sub-committees of parliament dealing with its judicial business when, as is sometimes the case, they are described as councils general. As Professor Duncan has explained, they were so called because representatives of each of the three estates were members, yet the numbers were not those of a parliament.¹⁴

The judicial functions of councils general as an alternative to parliament seem to have expanded during the Albany governorship, perhaps because a parliament could not be held unless the king was present and this was a physical impossibility during the English captivity of James I.¹⁵ The new role of council general was not apparently abandoned on the king's return in 1424; certainly in the reign of his successor, James II, we find that council general, like parliament, has its auditors of causes and complaints,¹⁶ while in 1428 parties were cited to appear before the king or his council 'at the first day of our next parliament or council general' for a determination as to which one should be given possession of lands recognosced by the king.¹⁷

(b) The king's council

The last reference underlines the critical point that both parliament and council general had as their core the king's council.

14. Duncan, 'Central courts', 325 - 7.

15. Duncan, 'Central courts', 327; 'Councils general', 141 - 3.

16. APS xii 22, no. 41 (Scone Liber no. 213); APS ii 46, c. 8.

17. Highland Papers ii 160.

There is evidence to suggest that council also exercised judicial functions outwith its afforced sessions as parliament or council general.¹⁸ It is however possible that these functions were rather more limited than the 'common justice' of a parliament or council general. As late as 1487 it was possible to say that only cases 'pertenying in speciale to our soverane lord' fell within the proper jurisdiction of his council, these being 'accions and complaintis made be kirkmen, wedowis, orphanis and pupillis, accions of strangearis of uther realmis and complaintis made apone officiaris forfalt of execucioun of thair office'.¹⁹ This list of the king's special responsibilities in certain types of complaint was already very old in 1487. Thus Ailred of Rievaulx wrote in the twelfth century of David I diligently hearing the causes of the old women and the poor in each district that he came to.²⁰ Legislation attributed, more or less reliably, to David's successors constantly refers to their duty to protect the church, the poor and the weak,²¹ while Professor Duncan has drawn attention to the brieve 'de pauperibus quod dicitur audita querela', which may have accelerated procedure in cases of impoverished pursuers, as another possible manifestation of this aspect

18. Duncan, 'Central courts', 325 - 6, 332.

19. APS ii 177, c. 10.

20. R. Twysden, Historiae Anglicanae Scriptores X (London, 1652) col. 348.

21. See e.g. APS i 383, c. 42 (perhaps unlikely to be legislation of William I); 399, c. 5 (Alexander II); 467, c. 2 (Robert I); 576 (Robert III).

of the king's role.²² In 1401 the king's lieutenant and his ministers were ordered to give reparation for the just complaints of churchmen, widows, orphans and pupils 'simpliciter et de plano sine plegio', that is, without at least some of the usual formalities required of those raising legal actions.²³ Almost sixty years later James II wrote to the aldermen and bailies of Aberdeen and Perth under his 'signet of the Unicorn', explaining that 'it effeirs to the king of law to defend orphans and pupils being under age'.²⁴ There are also numerous examples from the fourteenth century of ecclesiastics such as the abbots of Cambuskenneth, Dunfermline and Arbroath, the bishops of Aberdeen and Moray and the friars preacher of Perth complaining before the king and his council of various wrongs committed against them. We know of these from royal letters issued under the privy seal giving commands to repair the wrongs, which are often said to have been issued 'ex deliberatione consilii'.²⁵

The king's responsibilities for his officers were also important at this period; indeed this may have been the most important class of case in increasing the judicial work of council in and out of parliament and council general. Commonly the king's executive briefes to his officers concluded with an exhortation to carry out

22. For the briefe see Formulary E, no. 52; Reg. Briefes, 43 (no. 43); Duncan, 'Central courts', 330.

23. APS i 576.

24. W.C. Dickinson, '"Our Signet of the Unicorn"', SHR 26 (1947) 147 - 148.

25. See Cambuskenneth Registrum no. 54 (RRS vi no. 356), Dunfermline Registrum no. 394, RRS vi nos. 83 and 152, Aberdeen Registrum i 136 - 141, 155 - 7 and 170, and Moray Registrum nos. 172 and 173.

the commands contained therein as he had no wish to hear complaints of his officers' failures to carry out their duties. That complaints were made and brought judicial work upon king and council, both in and out of parliament, is very apparent in our sources for the period. Thus for example the auditorial committee of parliament in 1341 dealt with a complaint by Scone abbey of wrongful diligence against its lands by the sheriff and bailies of Perth.²⁶ Throughout the latter half of the century, the volume of complaints was clearly such that it could not be handled centrally. When David II returned from captivity in England in 1357 one of the first tasks laid upon him by his parliament was the holding of a great justice ayre 'throughout the whole kingdom in his own person ... on account of the full justice of the king's authority which makes and strikes fear into wrongdoers'. Particularly prominent amongst the wrongdoers who would be thus stricken were those royal officers who had 'conducted themselves unfaithfully or fraudulently in their offices'.²⁷ No doubt this act owed as much to the need to regularise royal finances as to the complaints of the lieges,²⁸ but twelve years later parliament spoke of 'continual complaints' about the royal officers and of 'grave complaints' which had reached the hearing of the king. On this occasion it was ordained that the justiciars and the chamberlain were to convene all officers in each sheriffdom and put the conduct of their duties to an assize of the community of the land. If the assize declared these officers to have been at fault, they were to be

26. APS i.513 (Scone Liber no. 168).

27. APS i.491.

28. See Nicholson, Later Middle Ages, 149, 165.

put out of office.²⁹ In 1397 it was ordained that 'the justice in each justice ayre shall take knowledge ... upon sheriffs if they do duly perform their duty in their office', and this was re-enacted in 1398.³⁰ In 1404 further provisions were made for the supervision of sheriffs, and justiciars and sheriffs were encouraged to hold their courts at the due times so as to avoid delay of justice 'through negligence or injustice or fraud'.³¹ None of this of course is in any way direct evidence that the procedure of complaint before council was invoked against the misbehaviour of royal officers; but it does show regular attempts by council, in and out of parliament, to provide a judicial remedy for those who did complain of royal officers. We know that council did not wish to take on a heavy load of judicial work, work which would of course be brought before it by the complaint procedure. It would seem reasonable to suggest, taking the evidence of the fourteenth century as a whole, that complaints of royal officers were sufficiently regularly brought before council to compel the establishment of alternative methods of dealing with the problem. But the council continued to have work to do in this field. The controls over sheriffs introduced in 1397 were extended to the officers of the regalities in the following year, and it was further provided that lords of regality who failed to comply with this provision would be impleaded before the king.³² The

29. APS i 508.

30. APS i 570.

31. SHR 35 (1956) at 142.

32. APS i 571.

greatest of all temporal lords, the king himself, was brought under the jurisdiction of council in 1384, to answer 'to any party complaining of him' and to make prompt reparation for his wrongs.³³ In 1399, the misgovernance of the realm and the default of the keeping of the common law were attributed to the king and his officers, and the king was invited to complain of his officers before the council who would judge of their defaults.³⁴

It would however be unwise to suppose that the jurisdiction of the king and council was absolutely restricted to the complaints of the weak and the church and to the control of royal officers. The council was the king's and, within the limits of the common law, he could use it as he willed. Thus we find in the early fifteenth century an instance of a defender being called before the council to answer for purprestures on crown lands and rights.³⁵ Early in the reign of David II there is the remarkable case before council in which Robert Stewart gained sasine and possession of Liddesdale from William Douglas. Whether or not this judgment was within the law, or merely cloaked the collusive and illegal activities of Stewart and Douglas, the case itself does not fit into any of the categories just discussed.³⁶ Nor does the decret of council in 1388 by which Alan Lauder, constable of the castle of Tantallon in East Lothian, was ordered to yield it to the new governor of the

33. APS i 550.

34. APS i 572.

35. HMC xiv (3), 15, summarised Fraser, Douglas iii no. 369.

36. Morton Registrum ii no. 61; APS xii no. 8; RRS vi no. 44. See Scots Peerage vi 340 - 1.

realm, the king's second son, the earl of Fife and Menteith.³⁷

Council's primary function was to advise the king on the king's business; its activities could be confined by no theory, legal or otherwise, and if the king decided to hear a case with his council, then there was little to be done to prevent him. What can be said however is that there appear to have been categories of complainers with a right to be heard before the king and council and that others only gained audience there through his favour, or grace. The place where all had a right to complain before the king was in his parliament.

Fifteenth century evidence appears to confirm this view of the place of the council, in parliament or without, within the framework of jurisdictions. Thus we find James I 'committing a cause to his council' in December 1424;³⁸ perhaps an example of the king making council available as a matter of grace rather than as of right. An act of 1450 speaks of the penalties imposed upon officers proved guilty of trespass before king and council.³⁹ The jurisdiction over the king's officers was defined by statute in 1469. Only if the sheriff or other judge ordinary failed to administer justice to a complaining party, or administered 'parcial' justice, should action be taken before king and council. The complainer might 'summond his partii before the king' or have another officer 'in that part' appointed. But, the statute concluded, 'it salbe leful to the

37. HMC v 611. For some of the complex background, which relates to the Douglas succession after Otterburn, see Nicholson, Later Middle Ages, 201 - 2.

38. Paisley Registrum, 70.

39. APS ii 35, c. 5.

kingis hienes to tak the desisioun of any actione that cummis before him at his emplesance [my emphasis] like as it was wont tobe of before'.⁴⁰ Thus the king's pleasure might permit actions before council and had done so before the act. This statute put the action of wrongous and inordinate proceeding on a statutory basis and was preserved by the act of 1487 restricting council's jurisdiction to the traditional area of complaints against officers and also those made by churchmen, widows, orphans and pupils.⁴¹ In 1474, parliament ordered that 'all personis that has complayntis persew to thair juge ordinar and vex nocht our soverane lorde nor his consale with na complayntis bot gif it be on officiaris that will nocht do justice nor minister in thir office efter the forme of law'.⁴² Taken together these three acts clearly show the willingness, even the duty, of king and council to deal with their customary remit of complaints, in particular those against officers of the king, but also reluctance to deal with other matters.

It is of importance to note the distinction in these acts and others between the king and his council on the one hand, and the judge ordinary on the other. 'Judge ordinary' or 'judex ordinarius' was a phrase of canon law origin, used in the canonical texts as a contrast with the judge delegate. The judge delegate was one assigned to a particular cause or causes by some higher authority, a practice very familiar in medieval ecclesiastical law. The phrase 'judge ordinary' appears never to have been defined independently

40. APS ii 94, c. 2.

41. APS ii 177, c. 10.

42. APS ii 107, c. 11.

in the canonical texts, but its implication seems to have been that of one who had jurisdiction by virtue of permanent office rather than through delegation from above. Within the church therefore the bishop was the ordinary judge of his diocese, while Tancred could state that the pope was the judge ordinary of all Christendom. Within his diocese however the bishop might delegate his jurisdiction to archdeacons, commissaries and officials; similarly papal judges delegate were familiar figures throughout medieval Europe.⁴³ The contrast between ordinary and delegated jurisdiction was appropriated for use in the secular context in Bracton, where the king is said to be the ordinary of his realm, 'for he has in his hand all the rights belonging to the crown and the secular power and the material sword pertaining to the governance of the realm',⁴⁴ while those whom he appoints as his justices, sheriffs and other officials are his delegates, having no authority but that committed to them by the king.⁴⁵

The distinction between ordinary and delegated jurisdiction was of course familiar in Scotland from ecclesiastical practice and seems to have remained so throughout the medieval period.⁴⁶ Of its use to

43. For this discussion of the distinction between the judge ordinary and the judge delegate in medieval canon law see O.J. Reichel, A Complete Manual of Canon Law (London, 1896) ii 210 - 21; F.W. Maitland, Roman Canon Law in the Church of England (London, 1898) 104; R. Naz, Dictionnaire de Droit Canonique (7 vols., Paris, 1935) s.v. 'Ordinaire'; Ollivant, Court of the Official, 19 - 22.

44. Bracton, f. 55 b (ii 166).

45. Bracton, f. 108 (ii 306).

46. See Dryburgh Liber, 77 - 8; Ollivant, Court of the Official, 22 - 7.

describe secular jurisdictions nothing seems to have survived from before the fifteenth century, and then the earliest example is an act of 1458. Significantly it lays down that certain causes 'salbe decydit and determyt before the ordinar jugis of the realme, the lordis of the sessione haifande na power to know apone thame'.⁴⁷ The act of 1487 seeking to limit the business coming before the council speaks of the judge ordinary as one 'to quham the acciounis pertenis and efferis to be determyt and decidit',⁴⁸ recalling the words of another act in 1425 stating that bills of complaint which could not be dealt with by parliament should go to the judges 'to quham thai perten of law'.⁴⁹ It seems clear from this that the king and his council were not regarded as judges ordinary. It is in fact possible to derive a list of the 'ordinaries' from the fifteenth century statutes referring to the subject, and all were officers whom Bracton would have regarded as royal 'delegates' rather than 'ordinaries'. The act of 1487 says that the 'ordinaries' are the 'justice, chaumerlane, schireffis, barones, provostis and baillies of borowis and uther officiaris, jugis and ministeris of law'.⁵⁰ In 1500 a sheriff in hac parte was described as 'judex delegatus' while the sheriff principal was 'judex ordinarius' in the sheriffdom where he exercised jurisdiction.⁵¹ What we may be seeing here is a

47. APS ii 47, c. 2.

48. APS ii 177, c. 10.

49. APS ii 8, c. 24.

50. APS ii 177, c. 10; cf. APS ii 8, c. 24, and 94, c. 2.

51. Cawdor Bk., 104. On the distinction reference is made to Regiam, but I have not been able to trace the passage in any of the printed editions.

development somewhat analogous to one which took place in the church; the delegates of the ordinary exercise the ordinary's jurisdiction and in course of time by the establishment of their offices are increasingly seen as exercising jurisdiction by virtue of their office rather than through the delegation constituted by appointment to the office.⁵² So archdeacons and officials came to be ordinaries, having been delegates of the bishop; similarly, it is suggested, justiciars and sheriffs in Scotland came to be seen as judges ordinary as the jurisdiction of their courts became a matter of custom and thereby law. Something of this process may have already been seen in this thesis, with the apparent exclusion of the sheriff from cases of dissasine and mortancestor, leaving the justiciar with sole jurisdiction. The authority of the officers had ceased to be a matter of delegation by the king and was rather something which the law defined in relation to the office, no matter by whom or on whose appointment it was held.

If then the king had once been regarded as the 'ordinary' of his realm in Scotland, that was no longer true in the fifteenth century. But it seems clear that we ought not to think of the jurisdiction exercised by king and council as 'extra-ordinary', the term suggested by A.R.G. Macmillan in his Evolution of the Scottish Judiciary.⁵³ The contrast in the fifteenth century was still that between ordinary and delegated jurisdiction, and the jurisdiction of king and council was neither. Perhaps our best way of understanding the nature of the jurisdiction is through the

52. Ollivant, Court of the Official, 20 - 24.

53. (Edinburgh, 1941), pp. x - xi.

language of 'The Scottish King's Household', which lays down that the justiciars are to act 'so that no complaint be presented to the king except only such complaint as cannot be redressed without the presence of the king himself by the default of the justiciars or sheriffs'.⁵⁴

It was a supervisory, yet residual jurisdiction; a jurisdiction which stepped in where the common law courts failed or went wrong in some way. In this respect it appears little different from the jurisdiction of parliament to deal with 'common justice' as distinct from 'common law'. The crucial distinction between the two seems to have been that the right of complaint to parliament was less restricted than that to council. In parliament anyone could seek a remedy for matters beyond the scope of the common law; only certain persons had such rights before the council, namely, churchmen, widows, orphans, the poor, those complaining of royal officers and those permitted to come before council by the king's grace.

(c) Council and Sessions

The development of council's judicial functions and jurisdiction outwith parliament and council general in the fifteenth century is, as Professor Duncan has clearly shown, the true background to the emergence of the Court of Session in the sixteenth century.⁵⁵ But the wisdom of hindsight has, it may be suggested, misled scholars seeking to explain the nature of and reasons for this development. Some have spoken of the council actually becoming 'the supreme court',

54. SHS Misc. ii 36 - 7.

55. Duncan, 'Central courts', 329 - 336.

during the period although the precise meaning of this phrase, the use of which cannot be justified from contemporary sources, is obscure.⁵⁶ Others go less far and argue that rather the development manifests 'recurrent concern to establish a supreme court', which was only ultimately successful.⁵⁷ This is to be set against the background of Lord Cooper's 'chaotic welter of ill-defined and overlapping jurisdictions' and of courts 'inferior in capacity and efficiency' which led to 'an insistent and persistent public demand from a growing population for better and stronger organised justice'.⁵⁸ The evidence for this public demand is usually justified by reference to contemporary satires on the law⁵⁹ (which overlooks the fact that lawyers and the law have at all times and in all places been a standard target for such attacks⁶⁰) and also by reference to the fifteenth century statutes concerning the administration of justice. Yet as we have already seen some of these statutes, at least, must be used with the greatest caution in drawing anything other than the most limited conclusions from them.

56. J. Wormald, Court Kirk and Community (London, 1981) 14; see also her 'Bloodfeud, kindred and government in early modern Scotland', Past and Present no. 87 (1980) 54 - 97 at 77.

57. J.J. Robertson, 'The development of the law', in Scottish Society in the Fifteenth Century ed. J.M. Brown (London, 1977) 136 - 152 at 146.

58. Cooper, Selected Papers, 230, 234.

59. See e.g. G. Neilson in ADC ii, introduction, xxii - xxv; Cooper, Selected Papers, 230; Dickinson, 'Administration of justice', 347.

60. R.J. Lyall, 'Politics and poetry in fifteenth and sixteenth century Scotland', Scottish Literary Journal 3 (1976) 5 - 29 at 7 - 10. Literary complaints about lawyers were also familiar in England: E.W. Ives, The Common Lawyers of Pre-Reformation England (Cambridge, 1983) 285.

The starting point for discussion of the emergence from council of a fully-fledged central court is usually taken to be an act of 1425 passed by parliament on the return of James I from his twenty years of captivity in England. This provided that 'billis of complayntis the quhilkis may nocht be determyt be the parliament for diverse cause belangand the common profyt of the realme' should instead be taken before the judges 'to quham thai perten of law', that is, to the judge ordinary having jurisdiction. The bills were only to come before the king if the ordinary failed to do justice.⁶¹ Professor Duncan says of this act that it was an 'attempt to stem the flow of bills to the council',⁶² but it may be suggested that this is to misunderstand its import and overall context. The context is one of the subject's right to present a bill of complaint for remedy in parliament; the import of the act is not to prevent such complaints being made but rather one of too much business for parliament to cope with in the time at its disposal, even by the means of its auditors of causes and complaints. Accordingly, bills not dealt with should go to whichever judge had ordinary jurisdiction and only in the event of that failing should the cause reappear before parliament.

If it is accepted that parliament's jurisdiction in complaints was confined to cases where there was no ordinary remedy, then this act must have been doomed to fail in its attempt to deflect the pressure of business away to other courts. We may be able to see an indication of its failure in another act passed in the following year,

61. APS ii 8, c. 24.

62. Duncan, 'Central courts', 330.

1426, which provided that the chancellor, together with members of the three estates named by the king, should sit at three stated terms in the year to deal with 'all and sindry complayntis causes and querellis that may be determynit befor the kingis consal'.⁶³ The jurisdiction of this group was to be that of the council rather than parliament, but from the fact that its membership was to be drawn from the three estates it seems likely that it was intended to reduce the pressure of complaints work coming to parliament. The jurisdiction of parliament could however only be exercised in parliament; elsewhere only the more restricted jurisdiction of council could be made available. No doubt the act also reflects a need to organise the judicial business of council, to make it clear to potential litigants when such business would be done and to shift the burden of the work from the king's closest councillors to men chosen from the wider grouping of the three estates.

However it is examined, though, this act of 1426 cannot be seen as an attempt to establish a central supreme court. It must be seen as an effort to organise the handling of petitions and complaints to the king in council and in parliament in order to enable the work of government to be done efficiently. The choice of the chancellor to play a leading role in this is of some significance, the inference of an English model being difficult to resist. The earliest beginnings of the Court of Chancery

grew not from the departmental work of the Chancery but from the jurisdiction of the king's council to deal with bills of complaint. In the fourteenth century bills addressed to the king in council came to be passed to the chancellor, and before 1400 most petitioners had begun to address their complaints directly to him.⁶⁴

63. APS ii 11, c. 19. Note that O'Brien, 'Scottish parliaments', 26, and appendix C, has suggested that originally the chamberlain rather than the chancellor was to chair the sessions.

64. Baker, Introduction to English Legal History, 87.

In this work the chancellor was merely an 'informal delegate' of a council which could no longer cope with the work thrust upon it by a mass of petitions and bills of complaint. The work was passed to him because he was at the head of the chancery, the royal writing office which was the hub of the common law system and so the place where a petitioner might best be advised whether or not he had a remedy at law. If not, the chancellor might either himself provide a remedy or refer the matter back to council and parliament for legislative treatment.⁶⁵ Was the appointment of the Scottish chancellor made for similar reasons? He headed the Scottish chapel or chancery, controlling the issue of royal briefs by virtue of his custody of the great seal. The new judicial body was to handle the business of complaints which, it was claimed, could not be resolved by common law, and which was now proving too great a burden for parliaments and councils preoccupied with other matters.

The establishment of the 'sessions', as the judicial sittings of the chancellor and his colleagues seem to have been known, did not bring an end to the judicial tasks of parliament and council. In 1450 parliament passed a number of statutes concerning litigations before council. One permitted a person complaining of spuilzie to raise his action before the council in the first instance, reversing an earlier act of 1438 whereby the initial complaint was to be made to the sheriff.⁶⁶ Another made provisions for dealing with the contumacious defender who refused to answer a summons before council.⁶⁷

65. Plucknett, Concise History of the Common Law, 180.

66. APS ii 36, c. 7. For the 1438 act see APS ii 32, c. 2.

67. APS ii 37, c. 18.

There are a number of examples of cases before parliament, council general and council from this period, only one from a 'session'.⁶⁸ This tends to reinforce the view that the sessions were intended to relieve, rather than supersede, the other central institutions. In 1456 a council general set up a new scheme for sessions thrice in the year, indicating that 'all caus that can nocht be rede at this tyme be the auditouris of complayntis' were to be continued to the first of these sessions.⁶⁹ The members of the session were named by the council general, not by the king as in 1426. The scheme was approved and continued by parliament in 1458.⁷⁰ Again the members of session were nominated by parliament, while the jurisdiction of the sessions was more fully defined than ever before.⁷¹ Professor Duncan argues that the jurisdiction conferred was merely that of the council⁷² but it is much wider than the traditional subject matter of that jurisdiction already discussed in this chapter. It includes spuilzies under the act of 1450 mentioned above and spuilzies committed between the earlier act of 1438 and 1450 (which would otherwise have pertained to the sheriff) as well as 'all obligacionis, contractis and all maner of dettis and uther civile accionis the quhilkis concernys nocht fee nor heretage'. The act goes on to say that pursuers are 'to haif full fredome to folow thir accionis befor the saidis lordis [of session] or thir ordinar jugis'.

68. For the case 'in cessione publica' see Scone Liber no. 222 (APS ii 77, c. 38). Note also the reference to the 'next session' in Fraser, Douglas iii no. 87. For references to cases before parliament, council general and council see Duncan, 'Central courts', 332.

69. APS ii 46, c. 8.

70. APS ii 47, c. 1.

71. APS ii 47, c. 2.

72. Duncan, 'Central courts', 333.

The relative length and detail of the provisions anent jurisdiction in this act of 1458 make it difficult to accept that it was merely intended as a summary of existing rules. It looks rather more like a liberalisation of the jurisdiction of the central bodies, a shift away from the old position whereby they stood outside the ordinary processes of the common law. No doubt this was the outcome of a long period in which an increasing number of wholly private suits had been heard before them by the king's grace. After 1458, as the act itself indicated, the session was an alternative to the judge ordinary rather than a substitute in the event of his default, except in the field of 'fee and heritage'.

The sessions were however gradually abandoned, the last one apparently being held in 1468.⁷³ It is significant that in 1469 and again in 1474 parliament ordered that actions before to council should be confined to complaints against royal officers and that otherwise parties should bring their cases to the ordinaries.⁷⁴ These statutes should be seen as attempts to reassert the traditional jurisdiction of council at a time when litigants were looking to it to act as a substitute for the sessions with their wider statutory jurisdiction, for the records after 1478 show council exercising that jurisdiction. Parliament too seems increasingly to have regarded council as the body to handle its surplus business in the absence of the sessions. In 1467 it was provided that cases which the parliamentary auditors had been unable to determine could be continued to the council without litigants being required to take out new summonses.⁷⁵ In 1471 the auditors concluded

73. Duncan, 'Central courts', 331.

74. APS ii 94, c. 2; APS ii 107, c. 11.

75. APS ii 88.

their sitting with a provision continuing unfinished cases to the next parliament but allowing parties to 'tak new summondis til a schortar day befor the lordis of consaile'.⁷⁶ It seems clear therefore that at this period strain was being placed upon the traditional jurisdiction of the council, although its basic concepts still survived.

This is also the period when the actual records of parliament and council are becoming available for the scrutiny of the researcher. While he may bewail the lack of record for the period when sessions were being held, there is still much of interest to be learned from the record of the subsequent arrangements, which have recently been illuminated by the work of Dr. Trevor Chalmers.⁷⁷ In a sense the conclusions which he has drawn have already been available to scholars throughout the 150 years since the publication of the Acta Dominorum Auditorum by Thomas Thomson. To that work Thomson prefixed a chronological table of the sittings of parliament and its auditors and of council when carrying out its judicial work; as he put it, 'to exhibit the connection of the sittings'.⁷⁸ The Acta Dominorum Auditorum began in 1466, the Acta Dominorum Concilii in 1478, so it is only from the latter date that any connection can be seen. The merest glance at Thomson's tables will show that the connection was very close until 1492 and that thereafter new arrangements began to come into effect.

The basic pattern which Thomson's table shows very clearly seems to have been the meeting of parliament, at which auditors would be

76. ADA, 14.

77. Chalmers, 'King's council', chs. 3 and 4.

78. ADA, introduction, i.

appointed and sit, followed immediately by prolonged sessions of council. Dr. Chalmers speaks of 'the lords of council who generally commenced their diet as the lords auditors finished theirs'.⁷⁹ As we have seen there is evidence that this was becoming established as practice at least as early as 1467 and 1471.⁸⁰ Professor Hannay noted of this period that 'continuation from Parliament to Council ... was not yet regarded as a matter of course' but that 'gradually the practice of continuing actions from the auditors in Parliament to the Council became familiar, and the clerk entered the date for the next hearing without specifying the court'.⁸¹ He linked this with the lapse of the sessions. Although he saw that in March 1478 auditors and council sat concurrently, he went on to argue that in general there was a lack of regularity in council's sittings which frustrated litigants and led to yet further accumulation of business.⁸² This view, also put forward by Professor A.L. Brown,⁸³ has now been authoritatively refuted by Dr. Chalmers:⁸⁴

[S]ome measure of regularity resulted from the habit of arranging council diets for the period immediately following the holding of parliament or, perhaps, of a general council; this meant that litigants might expect diets organised, at best twice yearly, for some time between January and March, and for the late autumn or early winter. Study of the practice of holding council diets around the time of a parliament

79. Chalmers, 'King's council', 162.

80. See above, 270 - 1.

81. R.K. Hannay, 'On the antecedents of the College of Justice', Book of the Old Edinburgh Club 11 (1922) 87 - 123 at 96.

82. Hannay, 'Antecedents', 97 - 8.

83. A.L. Brown, 'The Scottish "establishment" in the fifteenth century', JR 23 (1978) 89 - 105 at 91 - 2; see also Wormald, Court Kirk and Community, 24.

84. Chalmers, 'King's council', 231.

shows the underlying principle: parliament would meet, and elect auditors of causes and complaints, who would sit until parliament was dissolved or continued, or until some date designated by the parent body. While they were sitting, the lords of council, with personnel quite distinct from that of the auditors would hold brief hearings dealing with the king's business. After the auditors' jurisdiction expired, the council began its diet, and heard a general run of civil causes until it had dealt with all the summonses before it, or until circumstances necessitated terminating the sittings.

What this suggests, looking backwards to the earlier 'sessions', is that the pattern of the fifteenth century is one where surplus parliamentary work, doing justice to anyone with a complaint, was being passed on to council outwith parliament. Thus council's ordinary diet, the business of the king, complaints against royal officers and the grievances of kirkmen, widows, pupils and orphans, was perhaps extended to embrace most types of case, not because there was a desire to establish a supreme or central court, but because it was necessary to find some way of handling the flow of judicial business into parliament which would leave time for the other work of that institution. By 1480, after further attempts at diversion to the courts of the ordinaries and then to special sessions appointed, first by the king, then by the estates, a simple system whereby council completed the unfinished work of parliament had been established. The end result of course was to make access to the king's council for all types of litigants less a matter of royal grace and more a matter of right comparable to the right of complaint in parliament.

Dr. Chalmers has also traced the continuing changes in the system under James IV: the lapsing of the auditorial system as parliament was held less often and the establishment of fixed sessions

of council for judicial work not linked to the holding of parliaments as the problem became one of handling, not the flow of business to parliament, but rather the burden upon the council. With Professors Hannay and Duncan Dr. Chalmers is led by this to the conclusion that it is only from the later 1490s that one can speak of the emergence within the council of 'a regular and quasi-professional central judicature'.⁸⁵

(d) The comparative context

The simple explanation of the evolution of the various institutions of council and parliament is, then, that they were attempts to handle the business of council, in and out of parliament, with the aim always being to relieve the increasing burden on council. What is more difficult to explain is why this burden was increasing. Most writers have focussed on the inadequacies, the corruption and the ignorance of the ordinaries. But it may be suggested that this is too pessimistic and narrow a view. Few have examined the development of conciliar jurisdiction in a wider context.^{85a} The development of the Court of Chancery to cope with petitions to the English royal council has already been mentioned. Reference could also have been made to numerous other conciliar courts which began to emerge in fifteenth century England and in particular to the court of Star Chamber. As Chancery jurisdiction became more specialised and defined, so the royal council had to find other ways in which to deal with the continuing business of petitions. By the

85. Chalmers, 'King's council', 316; Hannay, 'Antecedents', 99 - 101; Duncan, 'Central courts', 334 - 5.

85a. Mention ought to be made here of Neilson's introduction to ADC ii and of Harding, 'Medieval brieves of protection', both passim.

reign of Henry VII, sittings of council in camera stellata were well established as 'a secondary forum for litigation during the law terms'.⁸⁶ Dr. J.H. Baker and Mr. Bruce Webster have suggested that the sessions of council in Scotland were 'in many ways like those of the English Star Chamber'.⁸⁷ It is therefore of some interest to note on what grounds English legal historians explain the rise of conciliar jurisdiction. Dr. Baker points to the influence of more powerful litigants to overawe and intimidate corrupt sheriffs and juries;⁸⁸ but stress can also be laid on the procedural advantages of suing before council rather than in the common law courts and on the freedom of conciliar courts from the constraints of the forms of action. It is important to realise that this was not quite the same thing as the later distinction between the two systems of Common Law and Equity, which was the result of a long process of development and change based on these original procedural differences. The party complaining before council did so because common law process would not permit justice to be done. But this was a 'mechanical' rather than a substantive failure of the common law to provide justice; it was not so much that the common law would not but that often it could not.⁸⁹

It was not only in England that such developments were taking place. It is many years since F.W. Maitland drew attention to the

86. J.A. Guy, The Cardinal's Court: The Impact of Thomas Wolsey in Star Chamber (Hassocks, 1977), 13.

87. Baker, Introduction to English Legal History, 31; Webster, Scotland, 157.

88. Baker, Introduction to English Legal History, 101; also Guy, Cardinal's Court, 8.

89. Milsom, Historical Foundations, 82 - 5.

rise of conciliar courts in France and Germany in his famous lecture on English Law and the Renaissance. In this context he also referred briefly to the fact that 'this was the time when King Henry [the eighth's] nephew James V was establishing a new court in Scotland, a College of Justice'.⁹⁰ Apart from W.S. Holdsworth, no-one in either England or Scotland has sought to elaborate this comparative point in explaining the development of conciliar jurisdictions, and Holdsworth did not take matters much further than Maitland.⁹¹ While the task of detailed comparison is beyond the scope of this thesis, the background to the rise of the conciliar courts of the continent has suggestive similarities to that found in the British kingdoms. The establishment of the German Reichskammergericht in 1495 was the outcome of a period in which 'courts came to be supplemented or replaced by the ruler's chancellery, the privy councillor, or by ordinary councillors' as a consequence of the practice of litigants bringing cases before them by petition. The Imperial Chamber Court was not a new institution; what happened in 1495 was a reconstitution or re-formation of something that was already there.⁹² In 1497 the Grand Conseil was formally separated from the French king's council to carry out judicial work, but it had already acquired a distinct identity as a court, taking cases 'in which the Parlement [de Paris]

90. F.W. Maitland, English Law and the Renaissance (Cambridge, 1901) 19 - 20, 69 - 70.

91. Holdsworth, History of English Law iv 56.

92. See G. Dahm, 'On the reception of Roman and Italian law in Germany', in Pre-Reformation Germany ed. G. Strauss (London and Basingstoke, 1972) 282 - 315 at 285; also in the same work F. Hartung, 'Imperial reform 1485 - 1495: its course and character', 73 - 135, and K.S. Bader, 'Approaches to imperial reform at the end of the fifteenth century', 136 - 161.

had either shown signs of partiality or become involved in a jurisdictional dispute with another sovereign court'.⁹³ In the Burgundian Netherlands, appeals to the council of the duke led to the establishment of the Parliament of Malines in 1473. Although it was subsequently abandoned, the court was revived under the name of the Grand Council in 1504. This development owed something to 'the promise of more impartial justice by courts that were not involved in local tensions or influenced by local potentates'.⁹⁴ Similarly in Spain the supplemental judicial functions of the Consejo Real of Castile became increasingly important in the fourteenth and fifteenth centuries. From 1480 only Letrados, men with academic legal qualifications, were entitled to vote on matters coming before the council.⁹⁵

Clearly much work remains to be done on these developments in Europe and in England. In the present state of knowledge, however, the most striking common feature is that in all the countries considered, conciliar jurisdiction rose within and was supplemental to the established structure of ordinary courts. Its purpose was to do work which these courts could not or would not do. It would seem therefore that to present the development of conciliar justice in Scotland as the consequence of the inadequacies of the ordinary courts is to oversimplify and distort a very complex story. It cannot be denied that the established 'Dark Age' view contains a kernel of truth inasmuch

93. J.H. Shennan, The Parlement of Paris (London, 1968) 80.

94. R.C. van Caenegem, 'Law in the medieval world', Tijdschrift voor Rechtsgeschiedenis 49 (1981) 13 - 46 at 36 - 7.

95. R.L. Kagan, Lawsuits and Litigants in Castile 1500 - 1700 (Chapel Hill, 1981) 122 - 3.

as obviously council, in and out of parliament, did deal with complaints about the ordinary judges. But what did these complaints concern? When record becomes available in the latter part of the fifteenth century, such complaints hardly bulk large in the court's business and mostly they are of a technical, procedural nature: holding court in feriate time, failing to proclaim briefes of inquest in lawful manner, issuing summonses on less than forty days' notice and so on.⁹⁶ In short the crude view of the relationship between conciliar and ordinary courts cannot stand against the evidence. We must look for rather more subtle explanations of the increase of council's judicial work and, given the small amount of evidence available, we must seek guidance from comparison with other European systems undergoing a similar development at the same time.

This thesis is not an attempt to account for any quantitative increase in the business coming before council. The purpose of the argument presented in this chapter has been to affirm the essentially residual and supervisory nature of council's jurisdiction in relation to that of the ordinary courts and to show that, while that jurisdiction was expanded in the course of the fifteenth century, by virtue of transfers of business from parliament and from the sessions, the original limited jurisdiction was still kept in view as defining the proper role of council. The institutional developments of the fifteenth century are to be explained as devices for the efficient administration, not of justice in general, but of parliamentary and

96. See indices to ADA and ADC i, s.v. 'Assize', 'Error', 'Execution', 'Malversation', 'Sheriff'. Note also the remarks in Macdougall, James III, 203.-4.

conciliar justice, so that that business might be dealt with with the greatest despatch and not prevent the other functions of those bodies being properly carried out. The changing structure of conciliar justice in the fifteenth century is thus not to be explained by a theory of a 'dark age' in the law and its administration by the ordinary courts. It will be argued in the next chapter that only with this appreciation of the relationship between parliament and council, on the one hand, and the ordinary courts on the other, can the exclusion of the former from cases of fee and heritage be properly understood.

Chapter Six

Jurisdiction in Fee and Heritage

(a) Introduction

When the records of council and the parliamentary auditors of causes and complaints become available in the second half of the fifteenth century, it is immediately apparent that when a case before them concerned 'fee and heritage' jurisdiction would be declined by these bodies and the case remitted to the judge ordinary. The purpose of this chapter is to place the development of this limitation of their jurisdiction in the context of the argument of the preceding chapters. The argument has been that the administration of the common law in later medieval Scotland was primarily the responsibility of courts held by the king's officers such as the sheriff and the justiciar and that the role of parliament and council was essentially supplementary to and corrective of these courts. Within this system the rule that no man needed to answer for his freeholding without the king's pleadable brieve had a particular jurisdictional effect, in that the relevant brieves, those of dissasine, mortancestor and right, were competent only in the courts of the burgh, the sheriff and the justiciar. Thus most disputes over landholding, at any rate at the level of libere tenentes, would have been resolved in these courts. The last reference to the brieves rule which can be dated with confidence is c. 1400, but the continued use of the brieves of dissasine, mortancestor and right in the fifteenth century seems to imply that it remained of effect in that period.

As noted in the first chapter, historians have usually explained the fee and heritage rule as the consequence of a 'feudal victory',

the survival of the idea that pleas concerning landholding should be heard in the court of the lord of whom the land was held.¹ It is clear however that this explanation is unacceptable since, even if this 'feudal theory' ever did apply in Scotland, it would appear to have been superseded by the briefes rule.² A more subtle explanation of the exclusion of council from fee and heritage cases has been advanced by Professor Duncan.³ Because council could not call upon the men of the neighbourhood to give a verdict, it was debarred from dealing with landownership. This he seems to link with the fact that council, unlike parliament, was not fenced and had no dempster; thus council, unlike parliament, was not a court. Although Professor Duncan does not make the point explicit, it might be thought to follow from this that parliament, as a court, did have jurisdiction in fee and heritage.

The difficulty with such a view is the fact that parliament's auditors of causes and complaints could not hear cases of fee and heritage, and there is, it is submitted, no good reason for supposing that the auditors here exercised a lesser jurisdiction than that of the full parliament. It is true that parliament could appoint an assize and pronounce a doom based on the verdict of that assize; it did so constantly in cases of treason. We may also note that the auditors of falsed dooms reported back to parliament so that the

1. See above, 14.

2. See above, 137 - 46. Nevertheless on the two occasions when the judge ordinary to whom cases are remitted is named, he turns out to be a lord of regality (ADC i 188 (the archbishop of St. Andrews) and ADA, 13, 15, 17 (the earl of Angus)). As the briefes rule applied within regalities, however (see above, 138 - 9), it would seem that neither of these cases is inconsistent with the view expressed in the text.

3. Duncan, 'Central courts', 328; Duncan, 'James I', 3.

verdict could be pronounced by its dempster within the fenced full court.⁴ If such a procedure was conceivable for falsed dooms, it is difficult to see why it could not also have been used by the auditors of causes and complaints in cases of fee and heritage. The better view is that the auditors had no jurisdiction in such cases because parliament had no jurisdiction.

This point of view is reinforced by the observation that the application of the brieves rule would have had the effect of restricting the jurisdiction of both parliament and council, since none of the brieves described in Regiam or Quoniam as pleadable was addressed to these institutions. The little evidence that exists on how actions were brought before parliament and council suggests that a summons was issued in response to a bill of complaint and that in the early fifteenth century the summons took the form of a breve 'under the testimony of the great seal'. This means that the document was written in Latin on parchment and was authenticated by the quarter seal - that is, one half of the king's great seal.⁵ Since we only know definitely of the quarter seal from the reign of James I⁶ the position in the fourteenth century is uncertain, but it seems most likely that the breve of summons, either under the great seal proper or the quarter seal, was the standard writ by which defenders were brought before parliament or council to answer complaints. It has been said that the privy seal was 'commonly used by the council from the later fourteenth century', but all the examples cited in support

4. Duncan, 'Central courts', 337, 340.

5. See especially Highland Papers ii 158 - 60. On the quarter seal see Thomson, Public Records, 75 - 6.

6. Thomson, Public Records, 75; cf. RRS vi 28.

of that statement show this to have been in the execution of decrees rather than to summon defenders.⁷ Sometime in the first half of the fifteenth century summonses before council and the parliamentary auditors began to be issued under the king's signet seal. Signet letters were in the vernacular and written on paper, by contrast with the Latin and the parchment of the quarter seal brieve; ultimately they were to oust the brieve as the principal writ of summons.⁸ While then briefes were used to commence actions in parliament and council, they did not meet the requirements of the 1318 act, since they were not amongst the pleadable briefes; in any event they were being used less and less frequently during the fifteenth century.

However, it is clear that the connection between the briefes rule and the fee and heritage rule was not quite as simple as it may appear from the previous paragraph. There is a difficulty with the view that the briefes rule operated directly to deprive parliament and council of jurisdiction, and that is the difference, more than just one of words or of formulation, between saying that a court has no jurisdiction in fee and heritage, and that a man cannot be put out of his freehold except by pleadable brieve. The difference between a freehold, an interest enduring for one man's lifetime, and the potentially perpetual interest of heritage, has been explained elsewhere in this thesis.⁹ It means that, at any rate by the time

7. Duncan, 'Central courts', 334 and sources there given.

8. R.K. Hannay, 'The early history of the Scottish signet', in History of the Society of Writers to His Majesty's Signet (Edinburgh, 1936) 3 - 51 at 20 - 24.

9. See above, 147 - 52, 197 and 211.

records begin, the jurisdiction of parliament and council was wider than a strict application of the briefes rule would have permitted. An example will illustrate the point. A liferenter dispossesses a tercer. The tercer is forced to action by pleadable brieve because the liferenter can claim to be vest and saised of a freehold. The tercer's only remedy is the brieve of dissasine, because under that brieve she need only show a freehold interest herself. But by 1466 it would seem that such a case could be dealt with by parliament and council because no question of fee and heritage arose in it.

Differences between the two rules also emerges from consideration of the cases in which the fee and heritage exception was pleaded after 1466. It was usually raised by way of dilatory exception by the defender¹⁰ and in most cases it is apparent that he was in possession of the lands in issue. Thus the defender could also have pleaded the briefes rule. But there were also cases where the lords remitted the action because in the course of the litigation it emerged that at the heart of the dispute there were claims on both sides to a heritable title; in such circumstances the fee and heritage rule might protect a defender not in possession from action before the lords.

The cases in which it is most apparent that the defender is in possession are those where the complaint is of wrongful occupation. Thus in 1483 William Ayton claimed that Duncan Toshack had wrongfully occupied his heritage of Petteny for eight years. Toshack replied that he held the lands heritably in feu-ferme by a grant of Ayton's

10. See e.g. ADA, 3, *123; ADC i 161, 216; ADC ii 350; ADC (Stair) iii 44, 63, 139, 179.

father and excepted to the jurisdiction of the lords. Toshack having proved his lawful possession of the lands, the case was remitted to the judge ordinary as concerning fee and heritage.¹¹ Similarly in another action for wrongful occupation in 1490, this time concerning the barony of Fordell in Fife, the defender produced a royal charter under the great seal and a sasine and claimed the lands as her heritage. When the pursuer produced his sasine, the defender argued that the case should be remitted to the judge ordinary. The lords duly declined jurisdiction 'because the disputaccioun thirof nicht exclude ane of the said partiis perpetually fra the heretage of the said landis and als because the disputaccioun of the saidis sesing concernis the fee and heretage of the saidis landis'.¹² A complaint in 1492 of wrongful occupation of the barony of Luss was referred to the judge ordinary after the defender had alleged the lands to be his fee and heritage 'and wochit the samyn with the parell of law'.¹³ In 1495 the defender answered a complaint of eighteen years' wrongful occupation of Lammethin, Fife by claiming it as his heritage and producing an instrument of sasine. The lords referred the action to the judge ordinary as it concerned fee and heritage.¹⁴

In these cases of wrongful occupation held to concern fee and heritage (of which there are other examples¹⁵) it is obvious that

11. ADA, *123, 128*.

12. ADC i 161.

13. ADC i 216.

14. ADC i 419.

15. E.g. ADA, 10, 48; ADC ii 212, 258.

the defender is in possession since otherwise the action would be unnecessary, but it is also apparent that he had to prove some title to support his possession and his claim of heritage. If he failed in this, the action proceeded before the lords. So in 1502 when the abbot and convent of Jedburgh sued Andrew Ker of Ferniehurst for twenty years' wrongful occupation of Thornyhaugh in the forest of Jed, Ker produced his charter and sasine of Ferniehurst and claimed that Thornyhaugh was a pertinent of those lands. No proof of this was offered and his argument that the dispute was one of fee and heritage and should be remitted to the judge ordinary was rejected.¹⁶ The defender thus had to show lawful possession, possession of the kind which under the 1318 act would have compelled the pursuer to use a pleadable brievie to eject him. So in these cases at least we can see the fee and heritage rule operating in the same way as the 1318 act, protecting lawful possession, the only real difference being in the legal nature of the possession protected, heritage as distinct from freehold.

However the exception to the jurisdiction was not pleaded only in cases of wrongful occupation. Probably the commonest types of case where it was pleaded were actions of error against inquests in the service of heirs and actions of spuilzie. In the former of these the exception would be raised normally by the person served heir at the inquest, since it was his title, not that of the members of the inquest, which the action put in issue. Generally speaking he would have been summoned as a defender to the action for his interest and might have sasine as a consequence of the service.

16. ADC (Stair) iii 145.

So again such a defender would have had protection under the 1318 act.¹⁷ But none of the cases recorded in print show clearly the nature of the defender's possession, if any, and so it is also possible that here the fee and heritage rule operated in a different way from the brieves rule, looking not for the defender's possession but simply for two competing claims to land. But this need not mean that there was no relationship between the two rules; it would show rather that by the latter part of the fifteenth century the fee and heritage rule had by virtue of its separate formulation acquired an independent content and application. The question would then be to explain how this development came to take place.

Actions of spuilzie also raise difficult problems. It is worth beginning with the subject matter of the actions of spuilzie in which the fee and heritage exception was pleaded. They may be divided into two main types: either the spuilzie of rents of lands or the spuilzie of animals from lands. The basis for the defender's actions was of course ownership, or lordship, of the lands and entitlement to take the rents and profits thereof. In one of the earliest cases of spuilzie of rents, it was alleged that the defenders had been uplifting the mailles of Kimmerghame for the past three years.¹⁸ The fee and heritage exception was upheld and the case remitted to the judge ordinary. The facts are not completely clear, but the case appears to have arisen out of a dispute between the heir-male and the daughters of John Sinclair of Herdmanston.

17. E.g. ADC i 5, 6 - 7, 25, 36, 57, 67 - 8, 223; ADC ii 175; ADC (Stair) iii 139.

18. ADA, 13, 15.

The daughters were the defenders in the spuilzie case and subsequently acquired ownership of Kimmerghame, presumably as heirs general.¹⁹

It seems very likely therefore that they were in possession for the three years during which they were taking the rents and that they were not mere interlopers. Accordingly here again the rule about fee and heritage operated as the 1318 act would have done; perhaps a similar situation lies behind two other near-contemporaneous cases of spuilzie of rents in which also the fee and heritage exception was upheld.²⁰

The spuilzie of animals cases are less straightforward. In the action brought by Adam Blackadder against Thomas Edington in 1480, Edington claimed that he had taken the beast as a herezeld - that is, in exercise of the right of a superior to the best animal of his deceased tenant.²¹ Acting as a superior is not of course quite the same thing as being vest and saised of the superiority on a formal title; it might rather be a way of laying claim to the title of superior as against another. Nevertheless the record states somewhat ambiguously that 'the lard of Dalwolsy, advocate for Thomas Edington, allegit that a part of the landis of Blakader pertenis to the said Thomas in heretage and that the resoun of the landis he tuke a herezelde and is in possessioun thirof'. It is not clear whether this means that Edington claimed to be in possession of the lands themselves, or whether he was merely explaining his possession of

19. See ADC ii 394, 396.

20. ADA, 9, 13.

21. ADC i 78.

the herezeld by reference to his claim of a heritable title; but at all events the lords held that the case depended upon fee and heritage and remitted to the judge ordinary. Legal possession does however appear to be important in the complex case of William lord Ruthven against Archibald Preston in 1495.²² William alleged spuilzie of oxen from him and his tenants of Coustland by Archibald, who replied by claiming that the lands were his heritage, that he was in possession, and that he had taken the beasts for the maills. William called Henry lord Sinclair for warrandice and the argument became one between Henry and Archibald as to who had right to uplift the maills of Coustland. Archibald argued that Henry only had right by virtue of an agreement with his sister, whose rights ended on her marriage. The lords fixed a proof of the manner of the parties' possession, presumably as a preliminary to determining whether to uphold Archibald's exception that as the case touched fee and heritage it should be referred to the judge ordinary. By contrast nothing about the nature of the parties' possession emerges from the two other cases of spuilzie of cattle which were sent to be decided by the judge ordinary because, as all parties claimed heritable title to the lands in question, they concerned fee and heritage.²³

Another interesting group of cases are those where the pursuer alleged that an annualrent due to him was being wrongfully withheld from him by the defender. In essence these would have been actions for payment, but on a number of occasions in the printed records we

22. ADC i. 405.

23. ADA, 94; ADC i. 33.

find them being sent to the judge ordinary 'becaus it is fe and heretage and kan nocht be decidit but one of the partiis be hurt in the richt of thir heretage'.²⁴ An annualrent was a method of securing repayment of the loan of a capital sum without infringing the prohibition of usury. The sum lent was treated as purchasing the lender a right to receive a rent from the borrower's lands. The lender was formally infeft in his annualrent as a right in land and so acquired a heritable title. But, by contrast with the position under a wadset, the borrower was not divested of his own heritable title and possession.²⁵ It is significant that according to Quoniam the creditor's remedy in the case of the debtor's default was the brieve of right rather than the brieve of distress.²⁶ In the actions remitted to the judge ordinary by council, the problem appears to have arisen because the original holder of the annualrent right had assigned it to another and the validity of the transfer was denied by the borrower. So in 1480 John Porterfield claimed that an annualrent in the lands of Schethum had been assigned to him by his father, but was met by an allegation that this had been without the consent of the owner of the lands, the defender, Thomas Schethum.²⁷ Thomas would be in possession and his argument would have been that John's invalid claim would put him out of the free enjoyment of his heritage. So the lords' decision to remit the case to the judge ordinary as one of fee and heritage can be seen as a recognition that the claim

24. ADC i 63.

25. H.H. Monteath, 'Heritable rights', in Introduction to Scottish Legal History (Stair Soc., vol. 20) 156 - 198 at 187.

26. Quoniam Attachiamenta, ch. 40.

27. ADC i 58.

challenged the free title of a man in possession. Similarly in 1478 Andrew Mowbray sued John Barton for an annual and called Alexander Knightson, presumably the original creditor of the rent, as his warrant; it seems probable that Barton, like Schethum, was denying the validity of an assignation to the pursuer, so making the case one of competing claims to heritable rights appropriate only to the judge ordinary.²⁸ Following Quoniam, it would appear that in both cases the creditors' remedy was the brieve of right.²⁹

Finally we may note two of the many cases which arose out of the complex question of the succession to the lands of Sir Thomas Wemyss of Rires and Leuchars in Fife.³⁰ Sir Thomas died in the winter of 1478 - 79. By virtue of a royal grant of 1477³¹ Rires should then have passed to Arthur Forbes, husband of Elizabeth Wemyss, (the grand-daughter and heir of Sir Thomas). But when in March 1479 Forbes raised an action of spuilzie of thirty oxen and large quantities of crops 'out of the maynis of Reras' against John and Thomas Wemyss, 'sons to umquhile Schir Thomas of Wemis of Reras', the case was 'referrit and remittit be the lordis of counsale to be determit before the juge ordinare, because the landis that the said gudis

28. ADC i 18.

29. For another more complex case concerning annualrents which was remitted to the judge ordinary as concerning fee and heritage see ADC i 118. The precise nature of the dispute is unclear.

30. See generally my 'Jurisdiction in heritage and the lords of council and session after 1532', in Miscellany II (Stair Soc., vol. 35) 61 - 85.

31. RMS ii no. 1305.

was takin of is clamyt fee and heretage be baith the said parties and the questioun of the richt dependis apoun heretage'.³² In the context of the present discussion the main point of interest lies in the fact that the Wemyss brothers were protected by the fee and heritage rule although in 1479 they could show no ex facie valid title to justify any possession of Rires they may have had. Accordingly they could not have claimed the protection of the 1318 act. But, as I have attempted to show in detail elsewhere, John Wemyss did have some claim to a better right than that of Arthur Forbes in Rires.³³ The remission of Forbes' action of spuilzie to the judge ordinary was therefore based on the existence of competing claims of heritable right only and not on the lawful possession of Wemyss, showing that by this time the fee and heritage exception was wider in scope than the briefes rule.

The case may be contrasted with another action of spuilzie, this time of the lands of Wester Cruivie in Fife, brought in 1480 against James Bonar by Baldred Blackadder.³⁴ Blackadder's title to Wester Cruivie was derived from the conjunct fee of his wife, Margaret Melville, who was the widow of Sir Thomas Wemyss.³⁵ Nevertheless the case was remitted to the judge ordinary as a matter of heritage. Bonar had produced 'a letter of testimoniaie schewand that he was enterit as are to his fader ... be Arthur of Forbace as

32. ADC i 22.

33. 'Jurisdiction in heritage', 68 - 75.

34. ADC i 65 - 6.

35. For Margaret's right to Wester Cruivie see RMS ii no. 1303. For all the issues arising see 'Jurisdiction in heritage', 72 - 4.

his oure lord'; in other words he was in apparently lawful possession and so protected not only by the fee and heritage rule but also by the 1318 act.

This examination of the cases in which the fee and heritage exception was pleaded has shown that, while there was a substantial overlap with the brieves rule, there were situations where the lords declined jurisdiction even though the defender would have been unable to show that he held possession so that he could only be put out by pleadable brieve. It would seem therefore that there is no direct link between the two rules. Some other explanation for the fee and heritage rule must be found. In the remainder of this chapter it will be argued that the true origin of the fee and heritage rule lies in the exclusion of the jurisdiction of parliament and council where there was an ordinary common law remedy. The gradual abandonment of this position in the fifteenth century did not affect issues of landholding however, because in that area there was the additional hurdle of the brieves rule to be overcome. In this way the brieves rule helped to define what became one of the few limitations on the jurisdiction of parliament and, in particular, council. It will also be shown that council always enjoyed a particular jurisdiction to determine certain questions about the possession of land, and from this the tentative suggestion will be made that the canonist distinction of proprietary and possessory actions may have led to some idea that council was excluded only from proprietary actions, that is, those about ownership of lands or, in the terminology of medieval Scots law, the fee and heritage.

(b) The early restrictions

Professor Duncan states that, in the fourteenth and early fifteenth centuries, 'where an action concerned fee and heritage, the council had no jurisdiction'.³⁶ He bases this conclusion upon the evidence of a small number of cases, but in fact none of these give direct support to the statement since, while all involved disputes over land, in none did the council decline jurisdiction. Thus Professor Duncan refers to the decree of council general in March 1416 holding that the governor of the realm ought to recognise the superiority of the barony of Cessford and to maintain William Cockburn and his wife as tenants there. Cockburn and his wife had alleged molestation by William Douglas of Old Roxburgh, who claimed to be the superior of the lands, against the argument of the Cockburns that the lands were held of the king.³⁷ There is no hint of a declinature of jurisdiction here. Rather council general acts to maintain the possession of the Cockburns which was apparently justified by charters. A case of 1373 decided by the presides of parliament appears to be of a similar nature; the decret is that David Graham ought to remain in possession of the lands of Old Montrose and that the king ought to stand with him as warrantor, notwithstanding anything to the contrary by John Lindsay of Thurston.³⁸ Professor Duncan speaks of the 'delivery of possession' and the 'giving of sasine' by council in connection with these cases, but with respect that is not quite what happens; it looks more as though existing possession is protected by the decreets.

36. Duncan, 'Central courts', 328.

37. HMC xiv (3) 15 (no. 24).

38. APS xii 18 (no. 32).

Professor Duncan also mentions two cases of 1416 and 1423 recorded in two documents first printed by him.³⁹ Both involved the procedure of recognition, here meaning the process by which lands in dispute were taken into the hands of the superior of whom they were held in order to determine which of the competing parties had been the last lawful possessor thereof. The effect of the award was not to settle the whole question at issue between the parties but simply to define who should be pursuer and defender in the eventual litigation which would determine where the better title lay.⁴⁰ The person in possession as a result of the recognition could only be ejected by action against him begun by pleadable breve. Thus in the first of Professor Duncan's cases Sir John Ross of Hawkhead received lands which he claimed to hold of the king in fee and heritage, but only upon giving a pledge and subject to reservation of the rights of others. In the second case the lands had been recognosced and the pursuer, having given documentary evidence of his title (and so established the lawfulness of his possession), received the lands in pledge.

These cases are not therefore evidence about council's lack of jurisdiction in fee and heritage. Instead they are examples of what was a common form of process, not just before council, but also before parliament and indeed subject-superiors. Thus in 1422 Herbert Maxwell lord of Carlaverock received the lands of Nether Dryppis, which had been recognosced by the governor, in pledge, having given

39. In 'Councils general 1404 - 1423', SHR 35 (1956) 132 - 143 at 141 - 2.

40. On recognition see Skene, De Verborum Significatione, s.v. 'Recognition', no. 5.

evidence of his title to the superiority.⁴¹ In 1427 the king recognosced lands disputed between 'the lorde Kambal' and Sir John Scrymgeour as the first step in what were to be lengthy proceedings to determine their ownership.⁴² In 1459 recognosced lands were given in borgh (i.e. pledge) to Thomas Allardice by king and council;⁴³ similarly in 1467 the king in presence of his council commanded the chancellor to relax a recognition over certain lands in favour of David Hay of Yester.⁴⁴ That this procedure might be followed in parliament is shown by the dispute over the ownership of the barony of Rires between Arthur Forbes and John Wemyss of Pittencrieffe. Forbes and Wemyss were unable to agree on who the judge should be and upon which of them should be pursuer or defender. In 1481 parliament decided that the lands of Rires should be recognosced by the king, 'for staynchin of debate betuix the saide partiis, but nocht lattin thaim to borgh to nowther of thame'.⁴⁵ In 1485 Forbes sued Wemyss before council 'anent the asking of the lands of Reris to borgh quhilkis ar recognist in our soverane lordis handis for the debatis betuix the said partiis'. It would seem that Wemyss had gained possession for it was 'complenit be the said Arthur that the hous of Reras is takin fra him be uncoursable lettrez

41. Fraser, Carlaverock ii no. 31.

42. Highland Papers ii 152 - 175.

43. HMC v, appendix, 629 - 30.

44. Yester Writs no. 137.

45. APS ii 134.

purchest be the said Johne of Wemis'.⁴⁶ Subsequently the question of who had been the last lawful possessor was settled in favour of Forbes: in 1491 the records of the parliamentary auditors note 'that our soverane lordis faider quham god assolze let the said landis of Reres to borgh to the said Arthure Forbes efter cognitioun of the cause him self sittand in jugement'.⁴⁷

This last example shows very well how contentious and difficult to resolve the issue of possession might be and that it was not merely a matter of preserving the status quo. What was critical was the lawfulness of the possession; that is to say, possession based upon some ex facie valid and regular title such as a charter and sasine. It is clear that in most cases the determination of this question was only a preliminary to further action; the successful party had to find a pledge, or borgh, as an acknowledgement that his possession was interim only and not that of an owner. But it does not necessarily follow from this that council had no jurisdiction to hear questions of fee and heritage; all that can be said is that council (and parliament) had jurisdiction to maintain and, if required, to determine issues as to the most recent lawful possession of lands.

A more fruitful approach is to examine the small amount of evidence showing parliament and council declining jurisdiction in cases apparently concerned with the ownership of land. What is striking about them is that jurisdiction was declined, not on the grounds that the cases concerned fee and heritage, but on the grounds that the parties ought to use the common law. Two examples have

46. ADC i *107.

47. ADA, 159. See 'Jurisdiction in heritage', 74.

been mentioned elsewhere in this thesis, the cases of Robert Stewart lord of Menteith in 1368 and Marjorie Lindsay in 1401.⁴⁸ Both raised complaints in parliament and were told that their remedy lay at common law. In another chapter it was suggested that Robert Stewart's remedy for the recovery of terce lands belonging to his wife by reason of a former marriage would have been a brieve of dissasine.⁴⁹ The case is complex. The link between Stewart and the defender, Archibald Douglas, was most probably the earlier marriage of Stewart's wife, Margaret countess of Menteith, to Sir John Murray of Bothwell. Murray had died in 1351, to be succeeded by Sir Thomas Murray who in turn died in 1361. His widow, herself a Murray of Drumsargard, married Archibald Douglas in 1362, bringing with her a liferent of Bothwell as the conjunctfiar thereof with Sir Thomas.⁵⁰ It seems highly probable that in 1368 Stewart was seeking to regain the terce of Bothwell pertaining to his wife Margaret, while Douglas was asserting a freehold in the whole of the lands by virtue of the conjunct fee of his wife. Here then we have an actual example of the hypothetical situation discussed earlier, a dispute over lands, not involving any question of fee and heritage, which under the 1318 act should have been litigated by pleadable brieve. But in declining jurisdiction parliament did not mention the brieves rule; instead it was simply stated that Stewart must have resort to the common law in the court of the justiciar. Yet a century later the case could have been heard by parliament or council because it did not involve any dispute about fee and heritage.

48. APS i 505, 582. See above, 197 and 251.

49. See above, 197.

50. Scots Peerage iii 161 - 3, vi 138 - 40.

This case is extremely important. It shows a dispute over land being remitted by parliament to another court and the common law. In other words at common law parliament was not a forum for such litigation even though it involved lands held in chief of the king. The declinature of jurisdiction was not couched in terms of either the brieves rule or the fee and heritage rule; indeed, if the latter had been the rule at the time, the case would not have been sent away to another court. It seems clear that the case was remitted on the basis that parliament was incompetent to deal with complaints for which there existed remedies at common law: in this instance, the breve of dissasine in the justiciar's court.

Similarly Marjorie Lindsay's case does not seem to have involved any question of fee and heritage. Her complaint concerned dispossession from her terce of the estates of her deceased husband, Henry Douglas of Lochleven and Lugton,⁵¹ as well as from the tutory of her son William. The defender was Henry Douglas' brother, James Douglas the elder (patre) of Dalkeith. As Marjorie had a conjunct fee of her husband's principal lands of Lochleven, Lugton and Langnewton,⁵² her claim to terce must have been to the lands of Crossraguel, Lanarkshire, which Henry held of his brother. We know that after Henry's death James recognosced Crossraguel and that there was a dispute over the tutory of Henry's heir William.⁵³ In his testament Henry had apparently provided that Marjorie should be the tutor⁵⁴ but at common law William's nearest agnate, his uncle James,

51. For Henry Douglas see Scots Peerage vi 364 - 5.

52. Morton Registrum ii nos. 190 - 2.

53. See Morton Registrum ii nos. 194 and 217. For Crossraguel, Lanarkshire (Glassford parish) see RMS i no. 490 and Morton Registrum ii no. 106; also W.J. Watson, The History of the Celtic Place Names of Scotland (Edinburgh and London, 1926) 190, 576.

54. Morton Registrum ii no. 194.

would be entitled to the office. Thus at bottom this dispute was really about the right to possess and administer lands where the undoubted heir was not yet of full age. No question of fee and heritage arose, yet parliament declined jurisdiction. If the recognition by James had put Marjorie out of her terce, nevertheless his consequent possession was ex facie lawful and regular; it could therefore be shown to be wrongful only by an action at common law. It may be suggested that Margaret's remedy was the briefe of dissasine.

This case demonstrates again the concern of parliament and council to protect the most recent lawful state of possession and its inability to go further into land disputes. A similar rationale appears to underlie a case of 1430 in which parliament over-ruled a plea in a dispute over lands that 'the cause ought not to be determined by parliament'.⁵⁵ The reasons for advancing the plea are not known but what is said of the facts of the case suggests that they were connected with the jurisdiction of parliament to determine questions of land-holding where there was a common law remedy. The pursuer complained that the defenders had despoiled her of the lands of Luchald in the barony of Dalmeny and now unjustly held them. Accordingly this looks like a situation in which once again a briefe of dissasine would have provided an appropriate remedy and it was probably this which underlay the defender's contention that parliament had no jurisdiction. Nevertheless parliament restored the pursuer to the lands. The reason for this seems to have been the inability of the defenders to justify their possession of the lands once the pursuer had stated that she held, not of them, but

55. RMS ii no. 146; APS ii 28, no. 6.

of the king. Thus hers was the last lawful possession and that could only be challenged, in accordance with principle, by action at common law.

Finally this protection of possession emerges clearly from another case in 1385 where the pursuer was sent to his common law remedy, this time by council general rather than parliament.⁵⁶ The case also shows that complaints might be remitted to the common law even though they did not concern landholding directly. William Fenton complained of expulsion from his tenement and did obtain a decree of restoration. The facts were very special. Fenton had been ejected from his lands in the barony of Dirleton, East Lothian, by judgment of the baron court. He had falsed the doom in the sheriff court of Edinburgh and, pending the outcome of this appeal, had been restored to his former possession. The baron however had again put him out and Fenton had sought a remedy for this abuse of process before king and council; a decree for his restoration had been pronounced and executed but once more the baron moved to expel him from possession. It was this last action of which Fenton complained before council general and for which he received another decree of restoration until the discussion of the doom of the baron court. The complaint was thus of contempt of a decree of council, which doubtless explains why, exceptionally in this period, council general dealt with the matter. But Fenton was sent to the common law 'concerning other articles contained in his complaint which do not depend from the falsing of the doom'. Fenton was in lawful possession and that would be protected by council; all else would require procedure at common law.

56. APS i 552.

In conclusion therefore, it is submitted that the jurisdiction of parliament in the fourteenth and early fifteenth centuries was indeed limited, but that limitation was not expressed as an exclusion from cases touching fee and heritage. Rather it was excluded from cases where a remedy might be had through ordinary common law procedure. Council general appears to have been subject to a similar limitation and, we must assume, so was council. But parliament and council did protect, and determine questions concerning, the most recent state of lawful possession of lands. This can be seen as part of the jurisdiction to supplement the common law. At common law the rule was that no one vest and saised of lands could be ejected from them except by action begun by pleadable brieve. The last lawful possessor was entitled to the protection of the rule, but if his or her identity was disputed how was the matter to be resolved? The capacity of council and parliament to deal with such questions should not however be misunderstood; this was undoubtedly a jurisdiction to establish and maintain the most recent state of possession of lands and thus to identify who should have the benefit of defending the subsequent action on the question of the right. It was not a covert substitute for a jurisdiction which belonged to other courts. With this understanding of council's jurisdiction we can make sense of an act passed in 1450, which Professor Duncan suggests concerns spuillzie.⁵⁷ It dealt with defenders contumaciously not compearing in answer to summonses before council. In general the defender was to be given three separate days to answer; if he continued contumacious throughout, then on the third day the action should proceed in his absence. There were

57. APS ii 37, c. 18; Duncan, 'Central courts', 333.

however special provisions 'gif the cause be of fee and heritage'. The case should not be proceeded with; instead the pursuer was to be put in possession of the lands where he was to remain until the defender paid the expenses and unlaws incurred through his contumacy. That done, 'he salbe herde in the principale cause movit agaynis hym nocht agaynstandand the decrete of possessioun befor gevin'. Only if 'prescripcioun lauchful' ran against him by reason of the length of time for which his liabilities ^{had remained unextinguished} would he be prevented from answering the cause of fee and heritage.

It seems clear that this statute is modifying the procedure, not of spuilzie, but of recognition before council. The pursuer is to be given possession without having either to establish that he was the last lawful possessor or to give a borgh. If the defender subsequently purges his contumacy, then the issue of last lawful possessor may be re-opened, unless prescription operates to prevent this. It is the reference to prescription which makes this interpretation particularly likely. Scots law has never known the possibility of acquiring ownership of land by prescription based on possession alone;⁵⁸ on the other hand medieval canon law allowed the pursuer in an action where the defender was contumacious to be awarded interim possession of its subject matter which would become definitive after one year without challenge.⁵⁹ What the act of 1450 is saying here is that the possession awarded where the defender has persisted in contumacy cannot be challenged on the basis that the pursuer was not in fact the last lawful possessor: the pursuer's possession is

58. Craig, Jus Feudale II, i, 8; C. D'O. Farran, Principles of Scots and English Land Law (Edinburgh, 1958) 187.

59. Reichel, Complete Manual of Canon Law ii 274, note 84.

now established and it is for the defender to raise the action concerning the right to which the recognition was a preliminary. The references to 'causes of fee and heritage' obscure the meaning of the act from modern eyes; but the phrase was used because recognitions and determinations of possession by council were the opening stages of just such causes, not because council had then acquired a jurisdiction to decide them finally itself.

(c) The emergence of the fee and heritage rule

In the previous chapter I argued that in the course of the fifteenth century the idea that parliament and council could not act where there was a common law remedy was gradually superseded. Perhaps the most likely explanation of this is that increasingly parties were allowed to raise actions before council by the king's 'emplesance' (this being perhaps linked with the development of the signet summons, a direct expression of the king's will). In 1458 the lords of session were given jurisdiction over most forms of civil action, it being indicated that in all these causes parties had 'ful fredome' to sue either before the session or the judge ordinary.

The jurisdiction of the session included all 'accionis the quhilkis concernys nocht fee nor heretage', while there were also special provisions about spuilzie. In 'spoliacione of movabill gudis nocht tuiching fee nor heretage' the lords might proceed 'indifferentle'; but in 'spoliacione ... done becaus of landis or possessionis debatable or grondyt apone fee and heretage' then they were to call upon the sheriff to restore the ground 'without preiudice of any party tuichande thir fee and heretage'. This was to be done by the familiar processes of recognition: the

lands were to be recognosced into the king's hands, the sheriff was to hold an inquest on who had been the last lawful possessor of the lands and to him the king would give the lands on receipt of a borgh. Although the act does not say so expressly this was presumably intended to be only the first step towards an action before the judge ordinary to determine where the ground right truly lay.⁶⁰ So here again the act is evidence of the limited competence of the sessions in cases of fee and heritage.

This act of 1458 is the first recorded use of the phrase 'fee and heritage' to define the limits of conciliar jurisdiction and it is necessary to explain how that formulation of the rule emerged. The starting point is the idea that parliament and council had no jurisdiction where there was a common law remedy. This idea survived 1458; as was shown in the last chapter, in 1469 and again in 1474 there were attempts to bring the jurisdiction of council back to its old limited scope.⁶¹ More particularly, where an action related to some issue about land-holding other than ownership, it remained the practice to remit the parties to some other remedy. Thus, as a number of cases demonstrate, where parties were 'grevit in exceding of marches and divise of land' a brieve of perambulation should be used, for 'the mater standis upon perambulacioun and redding of marchis'.⁶² Similarly brieves of division were appropriate for disputes between heirs-portioner or their representatives: for example in 1498 council ordained that 'because thir partiis allegis thare portionaris of thir landis and for the contencione had ymangis

60. APS ii 47, c. 2. For a different interpretation see Duncan, 'Central courts', 332.

61. APS ii 94, c. 2; APS ii 107, c. 11; and see above, 270.

62. ADA, 76, 78; ADC i 29, 62, 71, 72, 394.

thame thareof, that the chancellary be opin and that brevis of
divisione be gevin thame efter the forme of the chancellary'.⁶³

In two other cases the parliamentary auditors stated that the action
should be begun by a brieve de aqueductu. Thus in 1483 David
Lauder of Pople and James Ogill agreed that their respective claims
to the 'mylne dam' of Pople should be determined by such a brieve,⁶⁴
while in 1491 James Muschet's action against John lord Drummond 'for
the wrangwis doun castin of his myllande of Tolgart and stoppin of
the watter of the sammyn' was remitted to the sheriff 'because thare
is a breif of our soverane lordis chapell de aque ductu'.⁶⁵

Another case of a different type came before the parliamentary
auditors in 1479.⁶⁶ This concerned a land and tenement in Edinburgh
to the ground right of which there were various claims. The matter
having been often before both auditors and council previously, a
final decision to set the matter before a 'great assize' was reached.
Letters were to be addressed to the provost and bailies of Edinburgh
to set a lawful day for the hearing, on forty days' notice to the
parties. The assize was to be made up of the best and unsuspect
persons of the burgh and, if required, of the other burghs round
about. The purpose of the assize was to find out who had right and
was nearest and lawful heir to the lands, 'that thir may be a finale
ende and the trew grund fundyn in the said mater, ande quhat beis

63. ADC ii 119; cf. ADA, 67.

64. ADA, *119.

65. ADA, 147.

66. ADA, 83. Other relevant references are ADA, 61; ADC i 17,
43; APS ii 133.

fundin be the said gret assise to haf place and be kept in tyme tocum'. At first sight it looks as though the letters to the provost and bailies would take the form of a brieve of right (in which, it will be recalled, the burgh court had jurisdiction), but from the language used it seems more likely that the procedure to be adopted was to be that known as 'the great assize of right'.⁶⁷ This action was one appropriate where, as in the 1479 case, there were several competing claims to a piece of land and it appears to have been common in, although not confined to, burghs.

In all these cases concerning land the view of the court seems to have been that the parties should make use of an existing remedy available elsewhere to resolve their dispute. In none, it should be noted, had the fee and heritage exception been pleaded and only in the doubtful example of the brieve de aqueductu⁶⁸ was the remedy suggested one involving a pleadable brieve. In actions relating to land there was available a comprehensive range of remedies and parties were expected to use them.

It is also this idea which lies behind the fee and heritage exception, where parties were told that their action should be taken before the 'judge ordinary', that is, the judge having jurisdiction at common law over the land in issue.⁶⁹ The availability of remedies in his court means that parliament or council ought not to act. So

67. For other examples see Melrose Liber ii no. 526; Fraser, Maxwell Inventories no. 18 (misunderstood as a brieve of right in McKechnie, 'Brieves', 19); Fraser, Carlaverock ii no. 35; Dunfermline Burgh Recs. no. 46 and ADC i 21.

68. Although aqueductu is not listed amongst the pleadable brieves, it was an offshoot of the brieve of dissasine: see above, 197 - 8.

69. See above, 260 - 64.

it is clear that the remit to the judge ordinary in the later fifteenth century is another way of expressing the idea current in the fourteenth century, that the parties must resort to the common law. There is perhaps a change or development of vocabulary, but not in the basic idea. What is important however is that by the later fifteenth century this idea was operative only in cases relating to land and in particular in relation to disputes about ownership. What distinguished issues of landownership from other civil actions that they remained competent only in the courts of the ordinaries?

The answer must be the continuing force of the common law rule that, when a pursuer sought to recover lands from the possession of another, he had to proceed by way of a pleadable brieve. This rule distinguished disputes over title to land from all others. No similar rule compelled the use of the brieves de conventionne to enforce contracts or recover debts, or of the brieve de proteccionne regis infricta to gain reparation for other personal wrongs. For this reason, it is submitted, issues of landownership remained distinct even in an era when the existence of other remedies was ceasing to exclude the jurisdiction of parliament and, more especially, council: the necessary forms of initial writ pertained to the sheriff, burgh or justiciary courts.

It remains to explain, however, why, if the fee and heritage restriction was thus connected with the brieves rule, it was expressed not in terms of freeholdings, but of fee and heritage. This was not a direct result of the act of 1458. None of the subsequent fee and heritage cases refer to that act as might be expected if it were the immediate source of the rule. Moreover the act referred only to the 'sessions' and not to parliament or the full council (although it is

reasonable to suspect that by the 1470s council had inherited the jurisdiction of the sessions outlined in 1458⁷⁰). In the light of the earlier act of 1450, which refers to 'causes of fee and heritage',⁷¹ it seems likely that the terminology had become established before 1458 as part of the development of which that act was itself the outcome.

The explanation to be advanced here is almost entirely speculative but not, it is hoped, altogether without substance. It is based on the fact that, as shown earlier in this chapter, parliament and council enjoyed a jurisdiction over certain issues about the possession of land, in that the determination and maintenance of recent lawful possession was competent to them.⁷² If, as seems possible, this led to talk of a possessory jurisdiction then the familiar dichotomy of possessory and proprietary may have had some effect. In another chapter it has been seen that medieval jurists saw the heritable title as the proprietary one with all others being possessory.⁷³ Such an analysis was simplistic and misleading but if and when made it was capable of taking on a life of its own and effecting changes in the jurisdictional position. If issues about freeholdings were possessory, then a court with possessory jurisdiction could deal with them. So the original limited nature of that possessory jurisdiction might be forgotten; the court would only be excluded from proprietary matters, that is, in the lawyers' vernacular,

70. See above, 270.

71. APS ii 37, c. 18.

72. See above, 294 - 7.

73. See above, 197, 231 - 2.

those touching the fee and heritage.

This in turn must have affected the *briefes* rule and the use of *briefes*. By contrast with the *briefes* of right and mortancestor where the pursuer had to show a heritable title, there is only one piece of indirect evidence for the 'possessory' *briefe* of *dissasine* after the 1450s. Was this because those dispossessed now had actions before parliament and council? Thus for example in 1459 Janet Borthwick successfully sued in parliament to recover the barony of Morton, Dumfriesshire, from which she claimed to have been 'dejecta et expulsa' although she had a life interest as conjunct fiar with and widow of James Douglas, first lord of Dalkeith.⁷⁴ This certainly looks like a case where a *briefe* of *dissasine* would have been an appropriate remedy. The petition of the *Grahams* of Hutton expressed the *briefes* rule in terms of fee and heritage rather than freeholding;⁷⁵ was this because at the time the petition was made the law had changed by virtue of the developing jurisdiction of parliament and council?

(d) Conclusions

The petition of the *Grahams* of Hutton mentions two rules which exclude the jurisdiction of the king's council, one concerning pleadable *briefes*, the other a statement about council and fee and heritage. There is no suggestion there that one rule follows from or is a consequence of the other. They appear independent and self-supporting. The picture thus given seems to be a true one, for the

74. APS ii 79, no. 42; RMS ii no. 224.

75. HMC Various Collections v 77.

two rules did have a separate content and effect. Nevertheless there was a link between them, the brieves rule being critical, it is suggested, in confining the jurisdiction of the central courts of parliament and council at a time when these bodies, and in particular the latter, were admitting an increasing number of actions before them as a matter of course. The procedure which the law required to be followed could not be used in courts other than those to which the appropriate pleadable brieves were addressed. The lack of record and of any contemporary accounts of the jurisdiction of parliament and council defeats any attempt to produce a definitive explanation of the shifts and changes which took place during the fourteenth and fifteenth centuries. The story is a complex one, involving many factors in Scottish legal history which are now beyond recovery. But that there was connection between the two rules discussed in this thesis surely admits of little doubt. It is submitted that the emergence of the fee and heritage rule, whenever that took place, was linked with the brieves rule by virtue of the fact that the latter distinguished and marked off a category of disputes for uniquely restricted treatment under the procedures of the ordinary courts of the common law.

Chapter Seven

Conclusions

The general question with which this thesis began was that of the relationship between the medieval common law and the rise of the lords of council and session as the principal court in Scotland in the sixteenth century. The issue was to be approached by considering two jurisdictional rules, one from the medieval law, the other a restriction acknowledged by the lords, both of which related to litigations concerning land and which thus might appear to be connected in the sense that one was the source of the other.

The first conclusion is that in the later middle ages the judicial functions of parliament and council were seen, not as those of central supreme courts, but rather as essentially supervisory of and supplementary to, the ordinary processes of the decentralised court structure of the common law. There is no reason for supposing that this decentralised system had ceased to function or that it functioned only sporadically, and there is little evidence to show that its officers were either inadequate for or incapable of exercising their judicial functions. In relation to disputes over land in particular the common law courts enjoyed a near-exclusive jurisdiction by virtue of a rule found in the thirteenth century and given statutory form by an act of 1318, that no man could be put out of his freehold without the king's pleadable breve. This entailed the use, according to the nature of the dispute, of either the breves of dissasine or mortancestor in the justiciar's court, or the breve of right in the sheriff or burgh court. The evidence shows that in the fourteenth and fifteenth centuries a well-developed and sophisticated body of law, substantive and procedural, had been

built up around these forms of action by the courts in which they were used and it seems certain that when in the later fifteenth century council and the parliamentary auditors remitted cases of fee and heritage to the common law courts or the judge ordinary, it was to this structure of remedies that the litigants were expected to have resort.

But it does not follow from this that the two rules which have been the focus of this study were connected in the straightforward sense that whenever an appropriate case came before parliament or council the defender would plead the 1318 act and jurisdiction would be declined. There is no reference to the brieves rule in the printed records of the auditors or of council. The declinature is always in the terms of lacking jurisdiction in fee and heritage, not that the pursuer must use a pleadable brieve, so that there are clearly two independent rules. Moreover the two rules were not merely different ways of saying the same thing; their content and effect seem also to have been different.

The best way of explaining this, it is submitted, is to go back to the fourteenth and early fifteenth century cases concerning landholding in which parliament and council declined jurisdiction, not by applying one or other of the two rules, but on the general grounds that the parties should have resort to the common law. This can also be seen in the fee and heritage rule with the concept of sending the parties to the judge ordinary which is almost always referred to in the cases. But by the later fifteenth century, the general idea that parliament and council gave remedy only where there was no remedy at common law was being superseded and council in particular was being seen increasingly as an alternative to the

judge ordinary in most forms of case. The one exception to this was cases of fee and heritage; and there the survival of the old concept of a limited jurisdiction was due, it is suggested, to the existence of a structure of remedies which the common law required to be used and which could not be used in council or parliament.

That this was expressed in terms of fee and heritage rather than freehold, as in the *briefes rule*, is perhaps to be explained by the 'possessory' jurisdiction enjoyed by the council and parliament, which seems to have arisen out of the king's role as feudal superior in connection with the disputes over land of his vassals. One of the contending parties would be awarded interim possession of the debatable ground on the basis that his was the most recent lawful possession, based on some *ex facie* valid title. At this point the common law would come into operation; the holder could only be put out of his possession by the king's pleadable *briefe*. In determining preliminary issues of possession, therefore, the king and his council were only ensuring the observance of due process and enabling the common law to work, so that this particular function was consistent with the general supplementary nature of parliamentary and conciliar jurisdiction. While the evidence to support the hypothesis is lacking, it does seem plausible to suggest that the existence and elaboration of this possessory jurisdiction, alongside the development of jurisdiction in most other forms of civil action, may have led to the view that parliament and council were excluded only from proprietary disputes. In terms of medieval juristic analysis, 'proprietary' or 'ownership' disputes were those over heritable title. In practice there were of course many other forms of interest in land apart from the heritable title and by the 1318 act

disputes over a good number of these would have to be begun by pleadable brieve. But such non-heritable interests tended to be classed as possessory and thus competent to a court with possessory jurisdiction. Accordingly it was only from issues of property, or of fee and heritage, that the court was excluded.

The theory that the exclusion of parliament and council from fee and heritage was linked with the rule requiring pleadable brieves is further supported by the fact that it was only after the brieves of dissasine, mortancestor and right had apparently fallen into desuetude in the first half of the sixteenth century that the lords of council and session cast off the restriction on their jurisdiction. Thus it is stated in Balfour's Practicks:¹

Item, the lordis of session alanerlie, and na uther judge, ar jugeis competent to actiounis of reduction of infetmentis, evidentis, or sasines, and of all actiounis of heritage betwix all the liegis of this realme, spiritual or temporal, and to all obligatiounis and contractis followand as accessory thairupon, 20 Mart. 1545, Sir James Caldwell contra Sir James Maison.

Skene also cites a case of the 1540s ('ult. Februar 1542, Patrick Weems contrair Forbes of Reres') for the proposition that the lords of council and session were 'judges competent in all causes of heretage'. He points out that earlier questions of 'the ground richt and propertie of lands' had been determined before the justice general by the brieve of right, but that in Weems the lords had determined this process 'nocht to have bene nor yit to be thir mony yeires in use', so justifying their taking jurisdiction in such matters.² It is clear that Skene derived this decision from the

1. Balfour, Practicks i 269.

2. Skene, De Verborum Significatione s.v. 'breve de recto'.

practicks of John Sinclair, a collection of the decisions of the lords from 1540 to 1549 made by one of its judges, where under the heading 'That reductionn of auld infetmentis pertenis to the lordis of sessioun', appears the following passage:³

The last of Februar anno eodem in causa Patricii Wemyes contra dominum de Rires, the said lairdis procuratour allegit that the lordis of counsall wer na judges competent to the reductionn of his infetment vi yeiris auld, becaus thairthrow vald cum in disputatioun of the rycht of his landis, quhilk ground rycht of landis aucht be act of parliament to be decydit be ane breif of rycht befor the justice and nocht befor the lordis of sessioun. The lordis of counsall nochtwithstanding decernit thame competent judges in this mater, sic as thai wer thir divers yeiris in use of calling sic materis befor thame, and divers sic interlocutoris gevin, ut in causa domini de Sanquhair et in causa cuiusdam Pringill de Torsounis et aliis diversis, and als becaus the breif of rycht is nor hes nocht yit bene mony yeiris usit in this realme.

Although examination of the official record of this case in the Acts and Decreets reveals no reference to the desuetude of the brieve of right, it does show that the prolocutor for Forbes of Rires 'allegit the said mater was auld and that the lordis war na competent jugis thareto' and that the plea was repelled by a bench which did probably include John Sinclair.⁴ It seems quite likely therefore that his report can be taken as evidence that in developing jurisdiction in

3. The text from Sinclair's practicks is based on Edinburgh University Library Laing MS. III 388a with amendments suggested by a collation of that MS. with Edinburgh University Library Laing MS. III 429 and with NLS Advocates MSS. 22. 3. 4 and 24. 1. 11. The amendments are indicated in the text by italics: for 'vi' read 'vi^{xx}'; for 'landis', 'auld'; for 'brief', 'schiref'; for 'sic interlocutoris', 'sicitouris'. The consulted MSS. differ only on whether the infetment was six or six score years old: I have taken six, as the infetment of Arthur Forbes was in fact only of six years' standing: see MacQueen, 'Jurisdiction in heritage', 65, 78. For the MSS. of Sinclair's practicks see Murray, 'Sinclair's practicks', 91 - 2.

4. SRO, Acts and Decreets, CS 7/1/1, ff. 248 v. - 250 r., printed in MacQueen, 'Jurisdiction in heritage', 64 - 6. For Sinclair's presence see also *ibid.*, 66.

heritage the lords of council and session were consciously departing from the old law requiring brieves; indeed it is possible that, when Forbes' prolocutor argued that the 'ground rycht of landis aucht be act of parliament to be decydit be ane breif of rycht', he was referring to the 1318 statute of Robert I.

The desuetude of the pleadable brieves and so of the 1318 act must have been because parties seeking to recover lands were turning to other, more satisfactory remedies. By 1532, the year of the act for the erection of the College of Justice, it was being argued that the lords were the most appropriate judges to try causes of heritage,⁵ in one case because sheriffs were 'small persounis of little knowledge and undirstanding to decid apoun auld hiritage',⁶ in another because 'the sheriff and his deutes are oure simple of knowledge to decyde apoun auld heretage'.⁷ In many cases it appears that the parties to a dispute over heritage would agree to resort to the lords rather than the judge ordinary.⁸ It has also been suggested that use of possessory remedies such as wrongful occupation, spuilzie and molestation enabled the court to deal with questions truly affecting ownership and not just possession.⁹ However that may be, another form of action which was of great importance was the reduction of infeftments. In 1532 and 1533 it was still arguable that the lords had no jurisdiction in such cases, presumably because, since a

5. See Acta Sessionis (Stair), cases nos. 30, 33, 70.

6. Acta Sessionis (Stair), 46.

7. Acta Sessionis (Stair), 104.

8. E.g. Acta Sessionis (Stair) cases nos. 30, 33, 70.

9. By J.A. Clyde in ADC (Stair) iii, introduction, xli, and by Dickinson, 'Administration of justice', 350.

successful action would destroy a title to land, they touched heritage.¹⁰ But in Duddingston v. Duddingston in 1533 the lords declared themselves to be competent to reduce infeftments while recognising that this meant acquiring jurisdiction in proceedings against heritage.¹¹ In 1539 it was decided that 'all summondis rasis for reduction of infeftmentis be privilegiat, tablit and callit be the Monundayis table wolkly becaus the samin concernis tinsale of heritage'.¹² Wemyss v. Forbes and Caldwell v. Mason both fit into this development. Wemyss appears to reverse a decision of 1535 that the lords could not reduce 'old' infeftments.¹³ Sinclair's report of the case is headed 'That reduction of auld infeftmentis pertenis to the lordis of sessioun', and the exception pleaded on behalf of Forbes was that the lords were not competent judges on old infeftments. Caldwell asserts the exclusive nature of the jurisdiction; the record of the case, like the report in Balfour's Practicks, states that the lords 'are in use to tak the decisioun of all actiounis of retretting of infeftmentis, evidentis or seisingis to thame selfis'.¹⁴ Here was a further important step: not only did the court have jurisdiction in heritage, but it would act to prevent other courts exercising such a jurisdiction. The old

10. Acta Sessionis (Stair) cases nos. 15 (printed in Wigtownshire Chrs., 143) and 89.

11. Acta Sessionis (Stair) case no. 89.

12. Acts of Council (Public Affairs), 478.

13. Acts of Council (Public Affairs), 440.

14. SRO, Acta Dominorum Concilii et Sessionis, CS 6/20. ff. 18 r. - 18 v., printed in MacQueen, 'Jurisdiction in heritage', 80 - 1.

position was being reversed.¹⁵

By the end of the 1530s the lords of council and session were prepared to deal with questions of heritage even where reduction of an infeftment was not involved.¹⁶ Their appropriation of a general jurisdiction is confirmed by the Discours Particulier of 1560, which states that the sheriff has no jurisdiction in matters of fee and heritage.¹⁷ The pleadable brieves had disappeared and soon Scots lawyers had forgotten the nature and effect of these medieval forms of action.

It may be concluded that the existence and use of the brieves of dissasine, mortancestor and right made necessary by the medieval common and statute law of Scotland was instrumental in preventing the development of council's jurisdiction in fee and heritage during the fifteenth century. There was no fourteenth century break in the development of Scots law in this area and no revival of 'feudal' practices or theories. Law and procedure first promulgated in the thirteenth century (possibly having some earlier roots) not only survived but flourished in the later medieval period. It seems that a rule which, in J.J. Robertson's terminology, was of an 'archaic' character was not superseded by the growing 'maturity' of the fifteenth century.¹⁸ Rather the argument presented here supports the view of medieval Scottish legal development put forward by

15. Note that neither Wemyss nor Caldwell appears to have been the first decision on either old infeftments or the exclusive jurisdiction to reduce infeftments: MacQueen, 'Jurisdiction in heritage', 82 - 3.

16. Acts of Council (Public Affairs), 484, 486.

17. Discours Particulier d'Escosse ed. T. Thomson (Bannatyne Club, 1824) 11; P.G.B. McNeill, 'Discours Particulier d'Escosse 1559/60', in Miscellany II (Stair Soc., vol. 35) 86 - 131 at 109.

18. See above, 12-13.

George Neilson: 'running on lines parallel to, and often identical with, those of English jurisprudence, it pursued a course of its own, little changed by either English or French influence, until the sixteenth century'.¹⁹ There were no dramatic breaks, even in the sixteenth century; instead what we see is a gradually changing picture, an understanding of which is fundamental in approaching the emergence of the Court of Session as the supreme court of Scots law.

19. G. Neilson, 'The study of early law', JR 3 (1891) 12 - 20 at 19.

APPENDICES

Note

In editing the documents contained in these appendices, I have expanded all contractions and followed modern conventions of capitalisation and punctuation. Translations of Latin documents have been given. Editorial notes have been kept to a minimum.

APPENDIX A

DURHAM CATHEDRAL, Dean and Chapter Muniments, Miscellaneous Charters,
no. 1263.

Hec est finalis concordia facta inter dominum Anketinum priorem de Coldingham et conventum, tenentes, et Edam et Mariam de Paxton, sorores, et earum heredes, et Willelmum de Paxton, filium dicte Ede, petentes per breve domini regis de recognicione directum domino Willelmo de Lindesey tunc vicecomiti de Berwic et eius ballivis super quodam bosco vocato Ristoneside, scilicet, quod solium eiusdem bosci et custodia dictis priori et conventui et eorum successoribus remanebunt in perpetuum tali siquidem condicione, quod dicti Eda, Maria et earum heredes et Willelmus de Paxton rationabilia estoveria sua propria tam in domibus et sepibus construendis quam estoveriis carucarum per visum forestarii dictorum prioris et conventus libere percipient ad usus suos proprios de Aldenecrawe et dictus prior et conventus et eorum successores dictum boscum adeo bene sine wasto et destruccione custodiri facient quod dicti Eda, Maria et earum heredes et Willelmus de Paxton de omnibus in dicto bosco crescentibus rationabilia estoveria sua per visum forestarii sicut predictum est possint percipere. Et ut hec finalis concordia perpetuam optineat stabilitatem scriptum istud in modum cirographi est confectum cuius parti penes priorem et conventum residenti sigilla Ede, Marie et Willelmi filii Ede apponuntur pars vero penes partes prenominatas deposita sigillis [sic] capituli Dunelmensis et domini Anketini prioris roboratur. Teste curia domini regis apud Berwic in pleno comitatu.

Translation

This is the final concord made between the lord Anketin, prior of Coldingham, and the convent, defenders, and Eda and Maria of Paxton, sisters, and their heirs, and William of Paxton, son of the said Eda, pursuers by the lord king's brieve of recognition addressed to the lord William Lindsay, then sheriff of Berwick, and his bailies, concerning a certain wood called Restonside, namely, that the ground and ownership of the same wood should remain with the said prior and convent and their successors in perpetuity, but under a certain condition, that the said Eda, Maria and their heirs and William of Paxton shall freely occupy to their own use their own reasonable estovers of Auchencrow, both in the building of houses and hedges and in estovers of ploughs, under the view of the foresters of the said prior and convent, and the said prior and convent and their successors shall act to protect the said wood so well without waste or destruction that the said Eda, Maria and their heirs and William of Paxton shall be able to occupy their reasonable estovers of everything growing in the said wood under the view of the foresters as is aforesaid. And so that this final concord shall possess perpetual validity this deed is made in the form of a chirograph, to the part of which remaining in the possession of the prior and convent the seals of Eda, Maria and William, son of Eda, are affixed; however the part deposited in the possession of the forenamed parties is confirmed by the seals of the chapter of Durham and of the lord Anketin, prior. Witness the court of the lord king at Berwick in full county.

Notes (see text, pp. 42, 181 - 3, 203 - 4, 235 - 6).

- (i) The document is misleadingly discussed in M.L. Anderson, A History of Scottish Forestry (1967) i 100 and is referred to in the Handlist of Acts of Alexander II 1214 - 1249 compiled by J.M. Scoular for the Regesta Regum Scottorum series (Lost Acts, no. 388). There are two seal tags on the document, suggesting that it is the half which was given to the family of Paxton; it may be that its presence at Durham can be explained by extinction of heirs leading to all the documents anent the property being called in by the superiors. It is to be noted that in 1235 it was settled that the heirs of Paxton and Auchencrow owed homage, relief and marriage to Durham and not to Coldingham, a question previously in doubt (Coldingham Corresp., no. 239).
- (ii) Anketin prior of Coldingham: The document gives only the initial 'A', but there can be no doubt of his identity (cf. Raine, North Durham nos. 253, 339, 362, 365, 426 and 427). Dated documents show him to have been prior in 1239 (Raine, North Durham no. 272) and probably in January 1240/1 (Raine, North Durham nos. 479 and 480). His latest known predecessor was Thomas de Melsanby, who was elected prior of Durham in 1233, and his successor, Richard, was in office by October 1245 (see A.A.M. Duncan, The Bibliothek 2 (1959) at 8 - 9).
- (iii) Eda, Maria and William of Paxton: In 1236 lady Eda of Paxton, her first-born son Robert, her sons Robert (presumably a different Robert) and William, both clerks, and her daughters Cecilia and Matilda granted a nine year lease of the fisheries at Paxton upon Tweed which was confirmed by the prior and convent of

Durham, presumably as accepted superiors of the lands following the dispute of 1235 (Raine, North Durham no. 358).

- (iv) William Lindsay sheriff of Berwick: In an unpublished handlist of The Sheriffs of Scotland before c. 1306, Professor Barrow assigns William Lindsay's sheriffship to the period c. 1233 to c. 1240 (Raine, North Durham nos. 394 and 426). In the latter document, William's name appears alongside that of prior Anketin.
- (v) 'Aldenecrawe': This is clearly modern Auchencrow, a hamlet in Berwickshire (OS, NT 853 607) two miles south-west of the village of Reston (OS, NT 884 620). It should be noted that at the present time Auchencrow is pronounced 'Edincraw' locally (and see W.F.H. Nicolaisen, Scottish Place Names (1976), 126).
- (vi) Date: Anderson dates the document to 1249: this is clearly wrong. Scoular suggested sometime between 1226 and 1247. It is submitted that this can be narrowed down. The nature of the right of estovers (see text above, 235) suggests that at the time of the case Coldingham priory was regarded as the superior of the lands of Paxton and of Auchencrow. As shown above, from 1235 this was no longer so. Anketin may well have been prior of Coldingham from 1233. Accordingly the document can be placed sometime in the years from 1233 to 1235. Perhaps the dispute about the superiority between Coldingham and Durham was the reason why the seals of both were affixed to confirm or strengthen the document given to the family of Paxton, even though Durham was not party to the concord.

APPENDIX BScottish Justiciars c. 1306 - 1513.

For discussion of the list see chapter 2 above, pp. 93 - 118.

It is divided into four parts: (i) justiciars south of Forth (or of Lothian) to June 1488; (ii) justiciars north of Forth (or of Scotia) to June 1488; (iii) justiciars of James IV; (iv) justiciars appointed under the authority of the English crown between 1305 and 1340.

Dates given relate to spread of documents, not actual periods of office. 15th century justiciars 'of Scotia' are treated as justiciars of the whole kingdom, as explained above at pp. 60 - 61. Since such justiciars are otherwise found only south of Forth, these references are included in the first list.

(i) Justiciars south of Forth or of Lothian(a) JAMES DOUGLAS 1316 x 1319

Melrose Liber ii no. 415.

(b) ROBERT LAUDER ('the elder') c. 1319 - c. 1337

Dunfermline Reg. no. 352; HMC Various Collections v 8;

Laing Chrs. no. 27; Melrose Liber ii nos. 422 - 6;

Yester Writs no. 19; Perth Blackfriars, 18; Newbattle Reg.

no. 149; Yester Writs no. 22; Raine, North Durham no. 584;

Yester Writs no. 24 (misdated); Morton Reg. ii no. 34;

Raine, North Durham no. 218; Kelso Liber ii no. 484;

Paisley Reg., 28; Morton Reg. ii nos. 16 and 38; Raine,

North Durham no. 432; Fraser, Douglas iii no. 16; RRS

vi nos. 6 and 10; Raine, North Durham no. 586; Dryburgh

Liber, 274; ER i 452; Kelso Liber ii nos. 477 and 479;
Morton Reg. ii no. 50; Melrose Liber ii no. 393; Glasgow
Reg. i no. 280.

(c) WILLIAM DOUGLAS, 1st EARL OF DOUGLAS ante 1360 - 1374.

ER ii 82, 394, 462; Raine, North Durham no. 147.

(d) ROBERT ERSKINE 1366 (see also ii (j) below)

Raine, North Durham no. 326.

(e)? ARCHIBALD DOUGLAS, LORD OF GALLOWAY 1383

Melrose Liber ii no. 485 (see p. 104 n. 300 above).

(f)? DAVID STEWART, EARL OF CARRICK 1392

ER iii 311 (see p. 104 n. 302 above).

(g) ARCHIBALD DOUGLAS, 4th EARL OF DOUGLAS 1410

ER iv 133.

(h) ROBERT STEWART, DUKE OF ALBANY, EARL OF FIFE AND MENTEITH 1414

ER iv 412 (see also ii (s) below).

(i) ROBERT LAUDER OF THE BASS AND EDRINGTON 1425 - 1428

RMS ii, reign of James I, witness nos. 27, 36 and 45;

Laing Chrs. no. 81; RMS ii no. 29; Haddington Burgh Chrs., 13.

(j) THOMAS SOMERVILLE OF CARNWATH 1428 - 1435

Melrose Liber ii no. 525; Haddington Burgh Chrs., 15;

Aberdeen University Library MS. 1160/18/9, f. 1 r. (Appendix F);

Laing Chrs. no. 113; SRO, Peebles Burgh Recs. B 58/17/1.

(k) JAMES DOUGLAS OF BALVANY AND ABERCORN, EARL OF AVANDALE,

7th EARL OF DOUGLAS 1437 - 1441

Fraser, Douglas iii no. 301; Wigtown Charter Chest no. 24.

- (l) ALEXANDER LIVINGSTONE OF CALLENDAR 1444 - 1449
ER v 249; Foedera xi 238 (Bain, CDS iv no. 1216).
- (m) GEORGE CRICHTON ante 1454
ER vi 178.
- (n) WILLIAM LORD SOMERVILLE ante 1456
ER v 670.
- (o) WILLIAM SINCLAIR, EARL OF ORKNEY 1454 x 1456
APS i 705 (Ordo Justiciarie), ER vi 386, 433, 485.
- (p) LAURENCE LORD ABERNETHY OF ROTHIE MAY 1455
SRO, Society of Antiquaries Writs, GD 103/1/7 (Appendix G);
ER vi 168.
- (q) ANDREW STEWART, LORD AVANDALE c. 1457 - c. 1464
ER vi 201, ER vii 281, Irvine Muniments i no. 13
 (See also (cc) below).
- (r) COLIN CAMPBELL, 1st EARL OF ARGYLL, and ROBERT LORD BOYD 1461
Wigtown Charter Chest no. 31.
- (s) GILBERT LORD KENNEDY 1464
HMC iv 507; RMS ii no. 812.
- (t) WILLIAM LORD ABERNETHY OF ROTHIE MAY and WILLIAM LORD BORTHWICK
 1465
SRO, Lord Advocate's Dept. Writs, AD 1/60 (Appendix D).
- (u) JOHN LORD HOUSTON and SIR WILLIAM SEMPLE 1465
Wigtown Charter Chest no. 36 (See also SRO, Ailsa Muniments,
 GD 25/1/102. (Appendix H)).
- (v) WILLIAM EDMONSTONE OF DUNTREATH and GILBERT KENNEDY OF BARGANY
 1466
Irvine Muniments i no. 13 (See also (w) and (y) below).

- (w) WILLIAM EDMONSTONE OF DUNTREATH 1467
Morton Reg. ii no. 223 (See also (v) above and
(y) below).
- (x) ROBERT 1st LORD LYLE 1468
APS ii 94.
- (y) WILLIAM EDMONSTONE OF DUNTREATH and MASTER DAVID
GUTHRIE OF KINCALDRUM 1471
HMC xiv (iii) 27 (See also (v) and (w) above,
and (z) below).
- (z) MASTER DAVID GUTHRIE OF KINCALDRUM 1472 - 1473
Irvine Muniments i no. 13; SRO, Rollo of Duncub
Muniments, GD 56/11; TA i 66, 68; Nat. MSS. Scot.
ii no. 71 (misdated) (See also (y) above).
- (aa) THOMAS 2nd LORD ERSKINE 1474
TA i 53. (See above, pp. 80 - 81 and 113).
- (bb) ARCHIBALD DOUGLAS 5th EARL OF ANGUS ?1482 - 1483
APS xii 33.
- (cc) ANDREW STEWART, LORD AVANDALE and ROBERT 2nd LORD LYLE
1485
Peebles Chrs. no. 16 (See also (q) above and ii (y)
and (dd), iii, (a) and (c), below).
- (dd) ROBERT 2nd LORD LYLE and JOHN RAMSAY, LORD BOTHWELL
1488
APS ii 182 (also John lord Glamis and John lord
Drummond); Blair Castle, Atholl Chrs., Box 7,
parcel ii (4) (See also (cc) above and iii (a) and
(c) below).

(ii) Justiciars north of Forth or of Scotia

- (a)
- ROBERT KEITH
- 1310 - 1312

Abbotsford Misc. i 53; HMC v 626 (See also iv (a) below).

- (b)
- THOMAS RANDOLPH, EARL OF MORAY, LORD OF ANNANDALE AND MAN
-
- 1320 - 1331

Scone Liber no. 130; Chron. Wyntoun (Laing) ii, lines
3188 - 9 and 3210.

- (c)
- WILLIAM MUSCHET OF CARGILL
- 1319 x 1333

Moray Reg., cartae originales, no. 18.

- (d)?
- REGINALD CHEYNE
- 1330

Familie of Innes, 58. (See above, p. 98 and n. 74).

- (e)
- WILLIAM MELDRUM
- 1335

ER i 436 (See also below, i).

- (f)
- ROBERT LAUDER ('the younger')
- 1336 - 1337

Arbroath Liber i no. 290; Spalding Misc. v 243 - 4.(Fraser, Douglas iii no. 315). (See also iv (c) below).

- (g)
- ADAM BUTTERGASK
- 1337

ER i 436.

- (h)
- WILLIAM 5th EARL OF ROSS
- 1339 - 1358

Dunfermline Reg. no. 376; Fraser, Southesk ii no. 36;Panmure Reg., 169; ER i 543; Aberdeen Reg. i 79 - 81;ER i 546.

- (i)?
- WILLIAM MELDRUM
- 1358

ER i 562. (See above, p. 102).

- (j)
- ROBERT ERSKINE
- 1359 - c. 1368

RMS ii no. 3717; RRS vi no. 230; APS i 504;with HUGH EGLINTON 1360RRS vi no. 228; Fraser, Menteith ii no. 29

(See also i (d) above).

- (k) WILLIAM DISHINGTON 1370
RRS vi no. 462.
- (l) JAMES LINDSAY OF CRAWFORD ante 1373
ER ii 435, 437, 457.
- (m) ALEXANDER LINDSAY OF GLENESK 1373 - 1380
ER ii 435, 458 - 9, 620; ER iii 30 - 1, 652; Laing
Chrs. no. 65; Spalding Misc. ii 319.
- (n) ALEXANDER STEWART, EARL OF BUCHAN 1387 - 1388
Moray Reg. no. 168; APS i 556.
- (o) DAVID LINDSAY OF GLENESK 1389
APS i 556.
- (p) MURDOCH STEWART 1389 - 1390
APS i 557; Spalding Misc. ii 319; HMC vii (ii) 718.
- (q) WALTER STEWART, LORD OF BRECHIN 1391
HMC iii 417 (See also (u) below).
- (r) MURDOCH STEWART 1392 - 1401
Fraser, Menteith ii no. 43; Fraser, Grandtully no. 84*;
ER iii 316, 347, 376; Aberdeen - Banff Ill. iii 263;
Moray Reg. no. 180; RMS i no. 886; HMC iv 495.
- (s) ROBERT STEWART, DUKE OF ALBANY, EARL OF FIFE AND MENTEITH
ante 1406
ER iii 644 (See also i (h) above).
- (t) PATRICK OGILVY 1427 - 1428
RMS ii, reign of James I, witness no. 53.
- (u) WALTER STEWART, EARL OF ATHOLL, STRATHEARN AND CAITHNESS
1433 - 1435
Coupar Angus Chrs. ii no. 128; Pitfirrane Writs no. 24
(See also (q) above).

- (v) ALEXANDER STEWART, EARL OF MAR 1435

ER iv 634; ER vi 264.

- (w) ALEXANDER, LORD OF THE ISLES, EARL OF ROSS 1439 - 1443

Familie of Innes, 14; Munro of Foulis Writs no. 18;

Cawdor Bk., 14; Aberdeen Reg. i 241; RMS ii no. 1252.

- (x) JOHN LORD LINDSAY OF THE BYRES 1457 - 1466

Dunfermline Reg. no. 452; Aberdeen - Banff Ill. iv 205;

Spalding Misc. v 264; Dunfermline Reg. no. 458.

- (y) ROBERT 2nd LORD LYLE 1471

ADA, 12 (See also i (cc), (dd) above and iii (a) and
(c) below).

- (z) JOHN HALDANE OF GLENEAGLES 1478

ADA, 66.

- (aa) GEORGE GORDON, 2nd EARL OF HUNTLY 1479 - 1482

Aboyne Records, 401; Cawdor Bk., 63 (See also (cc) and
iii (f) below).

- (bb) DAVID LINDSAY, 5th EARL OF CRAWFORD 1487 - 1488

SRO, ADC, CS 5/16, f. 6; SRO, Society of Antiquaries Writs,
GD 103/2/42 (See also (cc) below).

- (cc) DAVID LINDSAY, 5th EARL OF CRAWFORD, and GEORGE GORDON,

2nd EARL OF HUNTLY 1488

APS ii 182.

- (iii) Justiciars of James IV 1488 - 1513

Dates are based on entries in the Register of the Great Seal,
the Exchequer Rolls and the Justiciary Records, unless otherwise stated.
See pp. 115 - 117 above.

- (a) ROBERT 2nd LORD LYLE, JOHN LORD DRUMMOND and JOHN LORD GLAMIS
1488 - 1489.
- (b) JOHN LORD DRUMMOND and JOHN LORD GLAMIS 1489 - 1491.
- (c) ROBERT 2nd LORD LYLE and JOHN LORD GLAMIS 1491 - 1495
Possibly from 1494 Lyle and Glamis were only acting
south of Forth. In 1493 Lyle appears to have acted
as justiciar south of Forth with Laurence lord Oliphant.
- (d) JOHN LORD DRUMMOND 1494 - 1497
Possibly in 1494 - 5 Drummond acted only north of Forth.
- (e) JOHN LORD DRUMMOND and ANDREW 2nd LORD GRAY 1497 - 1498.
- (f) ANDREW 2nd LORD GRAY and GEORGE GORDON, 2nd EARL OF HUNTLY
1499 - 1501. For Huntly as a justiciar south of Forth
in March 1499 see SRO, Glencairn Muniments, GD 39/24.
- (g) ANDREW 2nd LORD GRAY 1501 - 1513.

(iv) Justiciars appointed under English crown 1305 - 1340

- (a) The 1305 Ordinance of Edward I
See Stones, Documents no. 33; APS i 120.
Lothian: John de Insula, Adam Gordon
Galloway: Roger Kirkpatrick, Walter de Burghdon
Forth to the Mounth: Robert Keith, William Inge or
Henry Kighle
Beyond the Mounth: Reginald Cheyne, John de Vaux of
Northumberland or John de Vallibus.
- (b) DAVID MUSCHET, justiciar of Fife May 1306
See text above p. 69 n. 118.
Dunfermline Registrum no. 590.

(c) ROBERT LAUDER ('the younger') justiciar of the king of
England in Lothian 1334.

Rot. Scot. i 271.

(d) RICHARD TALBOT justiciar of the king of England in Lothian
1338.

Bain, CDS iii no. 1288.

APPENDIX CSCOTTISH RECORD OFFICE, Acta Dominorum Concilii, (1 March 1504/5)CS 5/16 ff. 144 v. - 145 r.

In the actioun and cause persewit be Catrin Folkart, Beatris Folkart, Elizabeth Folkart and Johne of Menzeis, hir spouse, again Robert Hamiltoun of Mylneburne, pretendit schiref deput of Lanark maid and constitut, as was allegit, be James erle of Arran, schiref principale of the schire, and Johne Were in Raclauch and Quentyne Folkart for his interest, that is to say, the said schiref deput for his partiale, wrangwis and unordurly proceding again the saidis persounis in the pretenditt serving and executing of ane breif of rycht of our soverane lordis chapell impetrat be the said John Were apone the landis of Folkartoun and in speciale becaus the said pretendit schiref deput put the said breif to the knowlage of ane assise, the borcht and recounter proponit of before nocht being discussit be warde and dume, as at mair lentht is contenit in the summundis thirupoun. The said Johne Menzeis, Quentin Folkart, John Weir comperand personally, and the said Robert Hamiltoun comperand be William Hamiltoun, his procurator, ande the said Johne Menzeis comperand as procurator for the said Elizabeth, Catrune and Beatrise: thare rychtis, ressounis and allegatiounis herde, sene and understand and thirwith being riplie avisit, in presens of the kingis hienes, the lordis of consale decretis and deliveris that the said pretendit process lede apoun the said breif of rycht, togidder with the sesing apoun the said landis and all that followit thirapoun, is of nain avail, force nor effect, in jugement nor without, in al tyme cuming, because the said schiref put the said breif to the knowlage of ane assise, the borcht and recounter before

proponit being undiscussit be warde and dume, as said is, efter
the forme of oure soverane lordis lawis, and ordanis our soverane
lordis lettrez to be directit hereupoun in dew forme as efferis.

Notes (see text, pp. 160, 217 - 8, 233).

This extract from the Acta Dominorum Concilii relates to a long-standing dispute over the lands of Folkerton, Lanarkshire (OS, NT 858359). Catherine and Beatrice Folkert were heirs-portioner of Folkerton who as early as 1476 were raising actions concerning the wrongful occupation and withholding of the maills of the lands by one Alexander Folkerton. The sisters' dispute with Alexander seems to have continued at least until 1501 (ADA, 46, 49; ADC i *91, 91, 93, 112; ADC ii 332, 378, 382; ADC (Stair) iii 24) and seems likely to have been linked with the issue raised by John Weir's brieve of right. The details are however obscure.

APPENDIX D

SCOTTISH RECORD OFFICE, Lord Advocate's Department Writs, AD 1/60 (22
January 1464/5)

Williame lorde Abirnethi in Rothimay and Williame lorde Borthwic,
justices til oure soverane lorde on southalffe Forthe constitute,
til al and sindri quhais knowlege thir present lettres saltocum,
greting: Wit yhe that thare comperit before us, in the justice ayre
of oure soverane lord the kingis be us haldin at Jedwort the xxii
day of the moneth of Januare the yhere of oure lorde a thousand
fourhundir sexti and foure yeris, Williame of Douglas of Drumlangrig
and his forespekare, Maistir David Guthrie of Kincaldrum, and present
til us in jugement a rolment of courte of the justice ayre ganging
before, undir the sele of office of justiciarie, tuiching the process
of a breffe of mortantecesstry purchesit be the said William apoun
the landis callit the Kirktonemanys with the mylne of that ilk and
thair pertinentis and the landis of the Flekkis with the pertinentis,
liand in the barony of Hawic within the schirrefdome of Roxburgh,
agane Alexander of Gledstanys and askit it to be red in court; the
quhilk beand red be the clerc of the said court, the said Maistir
David, forespekare to the said William, askit at us that the said
breffe mycht procede to the recognicioun of ane assise and be this
reson: because that at the last justice ayre of before the said
Alexander allegit a warrant and the justices assignit him this day to
produce his warrant and nane comperit, quharefore he had renuncit his
rycht and put it til ane othir, and for that reson, sen it was the
last excepcioun, thair acht na plede borowis na recountir to be herd,

bot the justices suld ger the breffe procede to the recognicioune
 of ane assise. Than comperit Alexander of Gledstanys and his
 forespekare, Schir Thomas of Cranston of that ilk, knycht, and allegit
 that the breffe acht nocht to procede to the recognicioune of ane
 assise and be this reson, because the said Alexander had allegit
 oure soverane lorde to be warant til him and he was within age
 quharefore he mycht nocht convene his hienes to mak him warandize
 unto the tyme he war of lachfull age and for that reson the said
 breffe acht nocht til pass as yit til ane assise and thairto profferit
 til have fundin borgh in the schirreffis hand. To the quhilk the
 said Maistir David, forespekare to the said Williame, ansuerit, sayand
 as of before that it was impertinent to the cause, al thingis
 considerit gangand before, to find any borowis, and besocht us as
 justices to be avysit with the barones and frehaldaris of the court
 quhethir at sic borowis acht to be ressavit as the mater was procedit
 or nocht. Than we gert devoyde baith the said partis oute of court
 and was avysit with the baronis and frehaldaris in the said cause,
 the quhilkis beand diligently and riply avysit, the partis agane
 incallit, decretit and deliverit that sic borowis profferit be the
 said Alexander of Gledstanys and his forespekare forsaid was impertinent
 and acht nocht to be admittit as the cause was procedit and at the
 breffe acht til pass to the recognicioune of ane assise. And
 incontinent we gert chese ane assise of thir personis folowand, that is
 to say, Schir Walter Scot of Kirkurd, knycht, Androu Ker of Altonburne,
 James of Ruthirfurde of that ilk, Schir Robert Colvil of Oxname, knycht,
 Androu Ker youngare, James of Twedy of Drummelier, Dungal Makdowel of
 Malkerston, Walter of Twedy, Androu Ormistoune of that ilk, Quintine
 Riddale of that ilk, Robert Ruthirfurde of Chatto, George of Douglas

of Bunjedwort, Thom Ker, George Tayt of the Pren, Archibald of Douglas, Waltere Scot, Hector of Lauedyr, Wil of Pringil, Robert Scot of the Haynig, Johne of Ruthirfurde of Hundwellee, Adam Scot, Arichbald Neuton of that ilke, Johne Turnbule of Ernhuych, George of Abirnethi and Thomas of Grymslaw. The quhilk assise, beand sworne be thare grate athis, the said breffe beand red, the richtis and merit is of the cause diligently and riply considerit, be thare forespekare Androu Ker deliverit in writ that sum tyme ~~S~~ir William of Douglas of Drumlangrig, knyght, the grantsire of William of Douglas of Drumlangrig, deit vestit and sesit as of fee of the landis quhilk ar callit Kirktonmanys with the myln of the sam with the pertinentis and of the landis of the Flekkis with the pertinentis liand in the barony of Hawic within the schirefdome of Roxburgh, and at the said William is lachful and nerast aire of the said sumtyme ~~S~~ir William his grantsyre of the said landis and myln with the pertinentis, and at Alexander of Gledstanys had wrangwisly haldin the said landis and mylne with the pertinentis quharefore the said William of Douglas acht til have sic sesine of the said landis and mylne with the pertinentis sic as sumtyme the said ~~S~~ir William his grantsire had of the sam landis and mylne with the pertinentis the day he was quik and dede. Eftir the quhilk deliverance it was gifin for dome be the mouth of Johne Stodart, soytour of Halden, that the said William of Douglas acht til have sic sesine of the landis of Kirktonmanys and the myln of that ilk with the pertinentis and the landis of the Flekkis with the pertinentis sic as sumtyme ~~S~~ir William of Douglas his grantsire had of the sam landis and mylne with the pertinentis the day he was quyk and dede and at the said Alexander of Gledstanys nor his ayris acht nevyr tobe herd in jugement apone the said landis

apon a breffe of mortantecesstry in tyme tocum. And thareeftir we gafe sesine be state ryal to the said William of Douglas of the said landis and mylne with the pertinentis in plaine court and comandit the schirref or his mare of fe to pass to the chemys of the said landis and mylne and thare to gif corporale sesine, state and possessioun of the said landis and mylne eftir the tenor of the said dome as eferis apon law. And this til al men quhilkis it eferis we mak kend be thir present lettres. In witnes of the quhilk thing the sele of oure office of justiciarie is to put the day, moneth, yhere and place beforwritin.

(Notarial docquet records that this was done at Jedburgh in the presence of various persons, including William Hacate of Belsyis clerk of the justiciary. The notary is Alexander Foulis, clerk of the diocese of St. Andrews and notary public. The seal of the office of the justiciary south of Forth is attached).

Notes (see text, pp. 120, 176, 202, 209, 242).

In November 1458 Alexander Gledstanes received from James II a confirmation of the dominical or demesne lands of Kirkton with its mill and of 'Flekkis', both in the barony of Hawick, Roxburghshire (RMS ii no. 646). The barony itself was the property of the family of Douglas of Drumlanrig (see Fraser, Buccleuch ii nos. 22 and 23). Kirkton is today two miles from the town of Hawick (OS, NT 539139); 'Flekkis' has not been identified. It is clear that Alexander's claim to warrandice from the minor James III depended upon the royal grant of 1458. The particular interest of the document lies in its discussion of procedure when a defender claimed warrandice. Two points would appear to have been important: the minority of the warrantor and his status as king.

James III was undoubtedly still a minor in 1465 (see W. Angus, SHR 30 (1951) 199 - 201, A.I. Dunlop, SHR 30 (1951) 201 - 204; Macdougall, James III, 7 and 125) and the forespeaker for Gledstanes contended that accordingly 'he mycht nocht convene his hienes to mak him warandize into the tym he war of lachful age'. Insofar as the general law of the middle ages relating to warrandice by minors is known, this appears to have been correct. A fragment which in most manuscripts is part of the Leges Forestarum, but which Skene and, following him, Lord Cooper printed as ch. 90 of Quoniam Attachiamenta, explains that where a minor is called as a warrantor the principal action will be sisted until he reaches majority (APS i 745, cc. 20 - 3 and also the 'Table of Authorities', APS i 262 - 3; Cooper, Regiam, 373 - 4). These passages are cited as from the Leges Forestarum in Balfour, Practicks ii 331 (in ch. Llll, read 'c. 63' for 'c. 83'). The fragment also states that the charters importing the minor's obligation of warrandice must be shown before he can be called. The position thus revealed tallies with that of English law as described in Bracton, where the requirement that charters be shown is explained by the fear that the voucher might otherwise be made deceitfully or frivolously (ff. 257 b, 260 b, 392).

But even though it seems that the contention advanced on behalf of Gledstanes was good law it failed to turn the case in his favour. The reason for this is not stated in the instrument recording the decision but probably was connected with further specialities of the law of warrandice where the king was called as warrantor. It is said in Balfour's Practicks (ii 327) that 'it is not the use, law, nor consuetude of this realme, that the King's Grace sould warrand onȝ alienatioun, infeftment, gift, or dispositioun maid be his Hienes to ony of his lieges, albeit the samin be maid titulo oneroso, and he have ressavit gude deid thairfour, Pen. Novemb. 1527, l t. c. 335'.

The authority cited by Balfour does not come from the so-called 'Auld Lawes' of the earlier medieval period but is rather a relatively recent decision of the lords of council and session. The absolute position here laid down may be contrasted with that stated by the medieval English texts such as Bracton, which held that the king might warrant the title of his tenant. However as king he could not be vouched to warranty like a private lord, since he could not be summoned by writ (Bracton, f. 382 b). In cases of mort d'ancestor the proper procedure was for the tenant to say he could not answer without the king: the assize would still be taken at once, but the enforcement of any judgment in the demandant's favour would depend on the king's pleasure (Bracton, f. 261; cf. Britton ed. F.M. Nicholls (Oxford, 1865) ii 110). Similarly the defeated tenant's claim to escambium against the warrantor could not be enforced against the king by his own courts (Bracton, f. 389 b). It is also apparent that in medieval English law vouching the king as warranty was regarded as a largely mischievous device for the delaying of pleas and so to be discouraged (see S.J. Bailey, Cambridge Law Journal 8 (1942) 274 - 299 at 292).

The plea for Gledstanes seems most likely to have been defeated as the result of rules similar to those expressed in Bracton. In the instrument there is no sign of any objection to the competency of calling the king as warrantor; rather the question was whether or not the principal action should be sisted further, and the decision of the court that it should not is consistent with the rules applied in England. The problem for the court was the conflict with the law on minor warrantors, which it resolved by holding that the rules concerning warrandice by the king prevailed. The king could not be

compelled to warrant a subject but might do so of his grace once the outcome of the principal action was known. In the long run, given that the king would not normally rescind from the warrandice given by him or his ancestors, neither party to the principal action would be prejudiced if its merits were determined immediately.

It may also be noted that the forespeaker for Douglas of Drumlanrig who argued this point so successfully was Master David Guthrie, later himself one of the king's justiciars (see above, p. 115 and below, Appendix H).

APPENDIX EDe Exceptionibus ch. 1

Quattuor modis de exceptio, videlicet, exceptio dilatoria, exceptio peremptoria, exceptio de jure et exceptio de facto. Exceptio dilatoria est petere visum terre vel aliquod dicere per quod placitum capiat dilationem. Exceptio peremptoria est quando aliquis monstrat contra aliquem aliquid factum antecessorum suorum sicut cartam vel quietaclamationem vel aliquid aliud dicit contra ipsum in agendo per quod poterit ab actione excludi. Exceptio de jure est ratio vel argumentum in disputando prepositum per quam vel quod sentit sibi esse sufficientem vel sufficiens, justum tamen est eis ad responsionem aliam resortum. Exceptio de facto est ratio preposita per quam utraque pars descendit in primam propositionem et post illam responsionem prepositam non valet ad aliam responsionem resortum.

Translation

There are four types of exception, as follows, the dilatory exception, the peremptory exception, the exception of law and the exception of fact. The dilatory exception is to ask a view of the lands or to say anything by which the plea undergoes delay. The peremptory exception is when one shows against another any deed of his ancestors such as a charter or a quitclaim or says anything else against the pursuer by which he can be excluded from the action. The exception of law is a reason or argument put forward in debate which is perceived by him to be sufficient, yet resort to another answer is just. The exception of fact is a reason proposed by

which either party descends into the first proposition and after the proposal of that answer it is invalid to resort to another answer.

Notes (see text, pp. 167, 175).

The text is based on a collation of the so-called Cromertie and Auchinleck MSS (NLS, Adv. MSS. 25.5.10, 25.4.15), where the passage will be found at ff. 13 r. and 189 v. - 190 r. respectively. Both appear to be of fifteenth-century date (APS i 183 - 4, 188 - 9). The chapter corresponds partially with a passage in Balfour's Practicks (ii 343) where it is stated that there are two kinds of exceptions, viz, dilatory exceptions, which 'prolongis and delayis the actioun or clame to ane certane time', and peremptory exceptions, which 'ar perpetual because they stay alluterlie and for ever cuttis away the actioun or claime, and resistis and stoppis the samin at all times'. The authority cited for this is chapter 1 of a treatise De Exceptionibus. Elsewhere Balfour cites other chapters from this treatise as follows: 2(ii 412, 414, 415); 3(ii 290, 294); 4(ii 298, 299, 300, 301); 12(ii 290, 294); and 13(ii 294). This capitulation does not however correspond with that of either Cromertie or Auchinleck, while the two MSS. also differ between themselves. In Cromertie, the treatise has 22 chapters, in Auchinleck 12. Some material appears common to Cromertie, Auchinleck and Balfour, but each also has sections unique to it. The one wholly consistent point would appear to be that the distinction of dilatory and peremptory exceptions was made in the first chapter. Consequently, while the contents, development and status of De Exceptionibus must remain a matter of doubt until further research is carried out, there is reason to believe that the text above can be

treated as evidence for the distinction of various types of
exception used in pleading by fifteenth century Scots lawyers.

APPENDIX F

ABERDEEN UNIVERSITY LIBRARY MSS. 1160/18/9 f. 1 r. - v.

Penes dominum de Somervile. Universis ad quorum noticiam praesentes litterae pervenerint, Thomas Somervile dominus de Carnwath ac justiciarius domini nostri regis ex parte australi aquae de Forth specialiter constitutus, salutem: Noveritis quod comparens coram nobis in itinere justiciarie domini nostri regis per nos tenta apud Streveline quarto die mensis Novembris anno domini millesimo quadringentisimo tricesimo, Mariota de Coningham, prosequens Susannam, sponsam Donaldi Cristason, ac ipsum Donaldum ratione ejusdem Susanna per breve domini nostri regis de nova dissasina, graviter conquerendo quod praedicta Susanna et Donaldus ipsam injuste et sine judicio dissaisiverint de terris de Ballul et Ballard cum pertinentiis jacens infra vicecomitatum de Streveline praedictum et post nonnullas et varias altercationes ab iisdem partibus in medium productas tandem ad dictam causam decidendam assisam nobilium virorum ex mutuo consensu partium in itinere praecedente electorum onerari fecimus. Quae quidem assisa diligenter consulta et examinata decrevit et declaravit quod praedicta Susanna et Donaldus, ratione qua supra, praedictam Mariotam de Coningham de supradictis terris de Ballul et Ballard cum pertinentiis injuste et sine judicio dissaisiverint; quare precipimus vicecomiti de Streveline quatenus praedictam Mariotam in praedictis terris reinvestiret et resaisiret. Et nos sibi, ut moris est, possessionem realem per traditionem baculi deliberavimus et praedictam Susannam et Donaldum secundum decretum curiae in centum marcis de dampnis praedictae

Mariotae taxatis condemnavimus. Et hoc omnibus quorum interest et interesse poterit notificamus per praesentes. In cujus rei testimonium sigillum officii nostri justiciarie praesentibus est appensum anno, die, mense et loco suprascriptis.

Translation

To all to whom notice of the present letters shall come, Thomas Somerville, lord of Carnwath and justiciar of our lord king specially constituted on the south side of the water of Forth, greetings: Know that there compeared before us in the justice ayre of our lord king held by us at Stirling on 4 November in the year of our lord 1430, Mariota Cunningham, pursuing Susan, spouse of Donald Christison, and the same Donald by reason of the same Susan by brieve of our lord king of novel dissasine, gravely complaining that the foresaid Susan and Donald had dissaised her unjustly and without judgment of the lands of Balwill and Ballaird with the pertinents lying within the foresaid sherifffdom of Stirling, and after some and various debates produced by the same parties in dispute, at last with mutual consent of parties we caused an assize of noble men chosen in the preceding ayre to be burdened with the decision of the cause. Which assize, having diligently consulted and examined, decreed and declared that the foresaid Susan and Donald, as above, unjustly and without judgment dissaised the foresaid Mariota Cunningham of the foresaid lands of Balwill and Ballaird with their pertinents. Wherefore we commanded the sheriff of Stirling to reinfett and resaise the foresaid Mariota in the foresaid lands. And we, as is usual, delivered real possession to her by tradition of sticks and we have condemned the foresaid Susan and Donald according to the decree of the court in 100 marks of damages

taxed to the foresaid Mariota. And we notify this to all whom it concerns or who may be concerned by the presents. In witness whereof the seal of our office of justiciary is appended to the presents, year, day, month and place abovewritten.

Notes (see text, pp. 185, 194, 204).

This is taken from the notes of John Gordon of Buthlaw (?1715 - 1775) an advocate who was joint professor of Civil Law at Edinburgh University from December 1753 to December 1754 (The Faculty of Advocates in Scotland 1532 - 1943, ed. F.J. Grant (Scottish Record Society, 1944), 84). As an historian he has been perhaps unfairly neglected (see Webster, Scotland, 26). He is known to have owned two 'auld lawes' manuscripts (ex. inf. Mr. W.J. Windram). His papers are preserved in Aberdeen University Library. The transcript is of a document said to be in the possession of the lord of Somerville, but it has not been traced amongst the Carnwath papers in the Scottish Record Office. The lands in issue are now the farms of Upper Balwill (OS, NS 548926), Lower Ballaird (OS, NS 551924) and Upper Ballaird (OS, NS 555919) in west Stirlingshire. It may be noted that Thomas Somerville is here said to be 'specially' rather than 'generally' constituted as justiciar south of Forth, although other evidence shows him to have held the office from 1428 to at least 1435. As he was holding an ayre it may be suggested that he was not acting here 'in hac parte'; rather the 'special constitution' related to the limitation of his jurisdiction to the south of Forth. See Appendix B(i)(j).

APPENDIX GSCOTTISH RECORD OFFICE, Society of Antiquaries Writs,GD 103/1/7 (4 March 1454/5)

In the justice ayre of oure soverane lorde the kingis haldin at Drumfrese on Tyseday the ferde day of the moneth of Marche the yere of oure Lord a thousand fourehundir fifti and foure yeris before Laurence lord Abrenethi in Rothimay and justice til oure soverane lord the king on southalff the watter of Fforth generily constitute thare comperit Mergarete Munduyle, the dochtir of sum tyme Henry Munduyle, lorde of Tynwald and lord of the Tempilland of Dalgernow with the pertinentis, with hir forespekare, Thomas the Graham of the Thornuke. The quhilk Thomas the Graham in the name and on the behalve of the said Mergarete askit at the said justice quhat he had done or gert do apoun the executione of twa brevis that scho had present til him of before tyme of the twa quartaris of the landis of the barony of Tynwald and of twa quartaris of the Tempillandis of Dalgarnow with the pertinentis liand within the schirefdome of Dumfrese; of the quhilk twa brevis, the tane was de morte antecessoris and agane Williame of Hepburne be resoun of sum tyme Janet, his spouse, apoun a quartare of the landis of the barony of Tynwald and a quartare of the Tempillandis of Dalgarnow with the pertinentis beforesaid, and the tothir was richt sa a breve of morteantecessoris and againe Hawys Munduyle apoun ane othir quartare of the landis of the barony of Tynwald and a quartare of the Tempillandis of Dalgernow. The quhilk justice ansuerit and said at he had direct two preceptis to the schiref of Drumfrese to summond or

ger summond the said William and Hawis and askit at the schiref quhat he had done thareto. And than the said schiref ansuerit and said that he had chargit the kingis seriand, David Haliday, to execute the said preceptis eftir the tenor of thaim. The quhilk executione the said David previt in court lachfully made be him. And the said Thomas the Grahame askit the said justice to ger the said twa brevis be red in court and to procede to the recognicioun of ane assise. The quhilkis brevis beand red, the said justice chesit ane assise of thir personis undirwritin, that is tosay, John the Menzeis of the Enach, William Grereson, George of Kirkpatric, Aymere of Gledstanys, Tassy of Maxwell of Collynhach, Florides of Murray, Robert Makbraare, Robert of Johnstoune, Robert Munduyle, Simon Lital, James of Kirkhalch, Gilbert Makmath, William Portare, Gilcriste Grereson, Thomas Fergusson, William Boyle, Cuthbert Molmerson, George Nelesoun, Johne the Menzeis of Achinsel, Malcolme Magilhauche, Johne Steuart, Davy Steuart, George Were, Donald Huntare and William Maxwell. The quhilk assise, the grete aith sworne and the avaymentis and the resounis of the party herd, passit oute of court and, thai riply and sadly (sic) avisit thare, incuming in courte agane concorduntly pronuncit thare veredict be the mouth of Johne the Menzeis of the Enach, sayand that sum tyme Henry Munduyle, the fadir of Mergarete Munduyle thare present, deit vestite and sesit as of fee of the twa quartaris of the landis of the barony of Tynwald and of the twa quartaris of the Tempill landis of Dalgernow with the pertinentis, and at the said Mergarete was nerast and lachful ayre to sumtyme the said Henry, hir fadyr, of the said foure quartaris of the said landis with the pertinentis, and at the forsaid foure quartaris

of the said landis with thare pertinentis war wrangwisly haldin fra hir be the forsaid William and Hawis, and at thare was no lachful cause to let the said Mergarete til obtene sesine and possessioun of the said foure quartaris of the said landis with the pertinentis, and at sic sesine suld be gevyn til hir of the said foure quartaris of the said landis with the pertinentis sic as sumtyme the said Henry, hir fadir, had of the said foure quartaris of the said landis with the pertinentis that day that he was quyk and dede. And than the said Thomas Grahame askit sesine of the forsaid foure quartaris of the said landis with the pertinentis tobe jugit to the said Mergarete be dome of court. And than the court, riply avysit, gafe for dome be the mouth of Thom of Hill, sutoure of Diercol, that the said Mergarete suld have sic sesing gevin til hir of the said foure quartaris of the said landis with the pertinentis sic as sum tyme the forsaid Henry, hir fadir, had of the said foure quartaris of the forsaid landis with the pertinentis the day that he was quyk and dede, outakand the landis annual rentis and the doweris of wemen outane in the said brevis. And than the said justice, at the instance of the said Mergarete, in jugement sittand gave heretable possession and state to the said Mergarete of the forsaid foure quartaris of the said landis with the pertinentis eftir the tenor and veredict of the said assise and dome of court, and chargit the schiref to ger gif hir sic like possession and sesine apoun the grond of the said landis with the pertinentis. And this til al and sindri quhom it aferis we, the said Laurence, makis kend be thir present lettres, to the quhilkis we have gert set to the sele of oure office the day, moneth, yere and place forsaid.

(Notarial docquet records that this was done in the tolbooth of the burgh of Dumfries in the presence of various persons. The notary is Alexander Foulis, clerk, notary public of the diocese of St. Andrews. There is a slit for the seal tag, but the seal is now missing).

Notes (see text, pp. 201, 208).

This instrument was first printed in abbreviated form by Matthew Livingstone (PSAS 41 (1906 - 7) 313). That version was more or less reprinted as part of an article by A. Cameron Smith, 'Mundeville of Tinwald and Mundell in Tinwald', Dumfries-shire Transactions, 3rd series, 22 (1938 - 40) 95 at 97 - 9. The above is a full version. Cameron Smith's article explains some of the factual background to the case. The lands in issue were in Dumfries-shire. The modern village of Tinwald is some three miles north-east of Dumfries (OS, NY 004815) while Dalgarnock was a village and parish north of Closeburn, near Thornhill in Nithsdale (F.H. Groome, Ordnance Gazetteer of Scotland (1886) ii 334). A farm, Templand Mains, may still be found near Closeburn (OS, NX 882942). A sixteenth century rental of the Hospitallers, successors in title to the lands of the Templars in Scotland, records that 'the landis of Dagarno in Nyddsdail were set in few of the auld to the lord of Tynwall payand therfor yeirlie of few maile xl s.' (Knights of St. John of Jerusalem in Scotland, 14).

APPENDIX H

SCOTTISH RECORD OFFICE, Ailsa Muniments, GD 25/1/102, 15 April 1466

In dei nomine amen. In curia itineris justiciarie domini nostri regis tenta et inchoata apud Dumbertane in pretorio eiusdem die martis decimoquinto die mensis Aprilis anno domini millesimo quadringentesimo sexagesimo sexto coram honorabilis viris Willelmo Simple et Johanne domino Howistone de eodem, militibus, justiciariis domini nostri regis ex parte australi aque de Forth infra vicecomitatum de Dumbertane specialiter constitutis, in iudicio comparuit nobilis et prepotens dominus, Gilbertus dominus Kennedy, et suus prelocutor, honorabilis vir Magister David Guthre de Kincaldrum, exposuit qualiter certo tempore devoluto appunctuatum et concordatus extitit inter prefatum dominum Kennedy et nobilem dominum, Robertum dominum Flemyng, super breve de morte antecessoris impetratum per dictum dominum Kennedy contra et adversus prefatum Robertum dominum Flemyng super terris que vocantur Estirmanys, Westirmanys, Schirvay, Bar, Badcol et Westirgartschou cum pertinentiis iacentibus in baroniam de Lenze infra vicecomitatum de Dumbertan, quod dictum breve de morte antecessoris in proximo itinere justiciarie tenendo apud Dumbertan absque impedimento seu obstaculo procederet ad assisam prout in indentura in pergamento scriptum sub sigillo dicti Roberti domini Flemyng in cera rubea infra albam impressa sigillatis in plena curia ostensis et perlectis plenius continebatur ut etc, iuxta tenorem eiusdem instrumenti super consensu et assensu ac iuramenti corporalis per dictum Robertum dominum Flemyng desuper prestiti. Quo facto comparuerunt in iudicio honorabilis vir Malcolmus Flemyng, filius et heres apparens predicti domini Flemyng,

et David Rede, procuratores legitimi predicti domini Flemmyng prout per suas litteras de procuratoris officio sub sigillo dicti domini sigillatis ostensis et perlectis plenius continetur, allegantes quod dictum breve de morte antecessoris ad assisam nunc [sic - read 'non'] procederet ex et pro eo quod processus dicti brevis legitimus iuxta ordinem eiusdem in forma debita nullatenus procedebat. Ad quod respondit dictus Magister David, prelocutor, quod attentis et consideratis compromissione et iuramentis inter prefatos dominos de eorum consensu et assensu factis et prestitis dictum breve absque aliquo processu ad assisam procederet indilate prout declaratur in libro Regie Maiestatis: nec preiudicat absentia alicuius partis quin procedat assisa cum iam de consensu suo posuerunt se in assisam ac etiam on (sic) alio capitulo iuxta finem si duo homines ponant se in inquisicione super aliquod factum inter ipsos nullum essonum valet quin procedat inquisicio. Similiter in Attachiamenis: si duo homines ponant se ad assisam pro veritate clarificanda de aliqua re dubia super aliquod factum inter ipsos ortum nulla essonia potest valere quin assisa procedet indilate. Et super hoc idem Magister David, prelocutor, cum instantia petiit decretum curie. Quibus itaque peractis post multas et varias altercaciones ab utraque parte prolatas predictis partibus extra curiam remotis, curia diligenter avisata per dominos barones et libere tenentes ibidem existentes, partibus reintratis, publice decrevit quod considerata compromissione de consensu partium facta et iuramentis desuper prestitis, dictum breve de morte antecessoris ad assisam procederat indilate absque excepcone et obstaculo quibuscumque. Et incontinente dicti domini justiciarii virtute sui officii et iuxta mandatum supremi domini nostri regis sub suo signeto ac subscripcione manuali directus elegere

fecerunt condignam assisam proborum et fidedignorum hominum quorum nomina subsequuntur, viz, dominus Johannes Maxwell, miles, Robertus de Conyngham de Conynghamhed, Johannes Berclay de Kilbyrny, Robertus de Crauforde, Robertus Mure de Polkelyhe, Magister Adam de Cokburne de Skirling, Thomas Lowis de Mennare, Thomas de Menteth, Jacobus de Douglas, Malcolmus Milery, Malcolmus Macferlam, Duncanus Napere de Kilmahow, Patricius de Galbrath, Patricius de Culquhone, Johanne Blare, Willelmus Arthurson, Angusius Campbel, Alquinius de Arngapil, Johannes Lile, Andreae de Galbrath, Gilbertus de Galbrath, Walterus Noble, Nirdane Buntyne, Johannes Hyndissayd de Bulule et Johannes Champnay. Que vero assisa hincinde diligenter consulta et plenius avisata, auditis dicti domini Kennedy cartis, litteris, evidentiis, juribus et munimentis et ad plenius intellectis consideratis qui in hac parte consideratis, decrevit et per sua corporalia iuramenta preiudicavit et deliberavit quod quondam dominus Gilbertus Kennedy, miles, avus Gilberti domini Kennedy, latoris presentium, obiit vestitus et sasitus ut de feodo de terris que vocantur Estirmanys, Westirmanys, Schervay, Bar, Badcol et Westirgartschore cum pertinentiis iacentibus in baronia de Lenze infra vicecomitatum de Dumbertane, et quod dictus Gilbertus dominus Kennedy est legittimus et propinquior heres eiusdem quondam domini Gilberti, avi sui, de dictis terris cum pertinentiis, et quod Robertus dominus Flemyng prefatas terras cum pertinentiis iniuste detinet, et quod Gilbertus dominus Kennedy habet plenius ius ad dictas terras cum pertinentiis et de jure recuperare debet talem sasinam dictarum terrarum cum pertinentiis qualem quondam antedictus dominus Gilbertus, avus suus, habuit de eisdem cum pertinentiis die qua fuit vivus et mortuus. Post quam quidem deliberacionem incontinente datum fuit per iudicium curie per os

Johannis Gordoun, sectatoris terrarum de Dalnottyr, quod dictus Gilbertus dominus Kennedy haberet talem sasinam terrarum que vocantur Estirmanys et Westirmanys, Schervay, Bar, Badcol et Westirgartschore cum pertinentiis iacentibus in baronia de Lenyhe infra vicecomitatum de Dumbertan qualem quondam dominus Gilbertus Kennedy, avus suus, habuit de eisdem terris cum pertinentiis die qua fuit vivus et mortuus, et quod dictus Robertus dominus Flemying nec heredes sui in iudicio nunquam audiantur penes breve de morte antecessoris temporibus profuturis. Quibus omnibus ut premittitur pronotis supradicti domini justiciarii matura deliberacione dederunt supradicto domino Kennedy statum realem omnium et singularum dictarum terrarum cum pertinentiis, precipientes et stricte mandantes honorabili viro, Johanne de Culquhoune de eodem, militi, vicecomiti de Dumbertan, quatenus procederet personaliter usque capitale messuagium dictarum terrarum cum pertinentiis et ibidem sasinam legitimam, investituram et corporalem possessionem dictarum terrarum cum pertinentiis prefato Gilberto tenderet iuxta tenorem decreti dicte assise et iudicii curie desuper datum prefato Gilberto domino Kennedy et heredibus suis pertinens temporibus profuturis. Super quibus omnibus et singulis dictus dominus Kennedy a me notario publico infrascripto sibi fieri petiit publicum instrumentum. Acta fuerunt hec in pretorio burgi de Dumbertan anno, die, mensi supradictis, indictione xiiii pontificis sanctissimi in Christo patris ac domini nostri, domini Pauli, divina providentia, pape secundi, anno secundo. Presentibus reverendo in Christo patre ac domino Andrea, permissione divina episcopo Glasguensis, nobilibus et prepotentibus dominis Andrea domino Avendale, cancellario Scotie, Johanne domino Dernle, Jacobo domino Hammiltone, Roberto domino Boyde, Roberto domino Lile, Magistro

Jacobo Lyndissay, preposito de Linclouden, et Magistro Alexandro Murray, canone Moraviensis, cum multis aliis testibus ad premissa vocatis specialiter et rogatis.

Et ego Alexander de Foulis clericus Sanctiandree dioceseos publicus auctoritate imperiali notarius predictis omnibus et singulis dominis sic ut premittitur fierent et agerentur unacum prenomatis testibus presentibus personaliter interfui eaque sic fieri.

Translation

In the name of God amen. In the court of the ayre of the justiciary of our lord king held at Dumbarton in its tolbooth on Tuesday 15 April in the year of our lord 1466 before the honourable men William Semple and John lord Houston of that ilk knights, justiciars of our lord the king on the south side of the water of Forth specially constituted within the sherifffdom of Dumbarton, there compeared in judgment a noble and powerful lord, Gilbert lord Kennedy, and his forespeaker, the honourable man, Master David Guthrie of Kincaldrum, explained how at a certain time in the past an appointment and agreement existed between the foresaid lord Kennedy and a noble lord, Robert lord Fleming, concerning a brieve of mortancestor impetrated by the said lord Kennedy against the foresaid Robert lord Fleming concerning the lands which are called Easter Mains, Wester Mains, Shirva, Bar, Bedcow and Wester Gartshore with the pertinents lying in the barony of Lenzie in the sherifffdom of Dumbarton; which said brieve of mortancestor should proceed to the assize at the next ayre of the justiciary to be held at Dumbarton without impediment or obstacle, just as it was written in the indenture in parchment under the seal of the said Robert lord Fleming impressed in red wax within white, the sealed documents having

been shown and read in open court as is more fully contained, etc according to the tenor of the same instrument concerning the consent and agreement and the bodily oath given by the said Robert lord Fleming on this. Then there compeared in judgment the honourable man Malcolm Fleming, the son and heir of the foresaid lord Fleming, and David Reid, lawful procurators of the foresaid lord Fleming, just as is more fully contained in their letters of the office of procurator under the seal of the said lord, which sealed documents were shown and read, alleging that the said brieve of mortancestor should not proceed to the assize because the lawful process of the said brieve according to the order of the same was by no means proceeding in due form. To which the said Master David, prelocutor, replied that, having regard to the submission and oaths made between the foresaid lords concerning their consent and agreement that the said brieve should proceed without any process and without delay to the assize, just as is declared in the book Regiam Majestatem: Nor does the absence of any party prevent the procedure of the assize when they have already put themselves on the assize of their own consent and also in another chapter, near the end, if two men put themselves upon an inquest concerning any matter, no essonzie avails between them and the inquest proceeds nonetheless. Similarly in Quoniam Attachiamenta, if two men put themselves on an assize to settle the truth about some doubtful matter concerning any question that has arisen between them, no essonzie can avail and the assize proceeds without delay nonetheless. And upon this Master David, prelocutor, earnestly sought a decreet of court. When these things had been performed, after many and various altercations drawn out by each party, the foresaid parties having been removed from the court, the court was diligently advised by the lord

unjustly withholds the foresaid lands with their pertinents, and that the said Gilbert lord Kennedy has full right to the said lands with their pertinents and of right ought to recover such sasine of the said lands with the pertinents such as the late foresaid Sir Gilbert, his grandfather, had of the same with the pertinents on the day on which he was alive and dead. After which deliverance, it was immediately given for the judgment of the court by the mouth of John Gordon, suitor of the lands of Dalnottar, that the said Gilbert lord Kennedy should have such sasine of the lands which are called Easter Mains and Wester Mains, Shirva, Bar, Bedcow and Wester Gartshore with the pertinents lying in the barony of Lenzie within the sherifffdom of Dumbarton such as the late Sir Gilbert Kennedy, his grandfather, had of the same lands with the pertinents on the day upon which he was alive and dead, and that the said Robert lord Fleming and his heirs should never be heard in judgment concerning the brieve of mortancestor at any time in the future. Which all noted as above the foresaid lords justiciars with mature deliberation gave the foresaid lord Kennedy real state in all and whole the said lands with the pertinents, ordering and strictly commanding the honourable man, Sir John Colquhoun of that ilk, knight, sheriff of Dumbarton, to proceed personally to the chief messuage of the said lands with the pertinents and there tender to the foresaid Gilbert lawful sasine, infeftment and corporal possession of the said lands with the pertinents in accordance with the tenor of the decreet of the said assize and the judgment of the court given upon this, to pertain for the future to the foresaid Gilbert lord Kennedy and his heirs. The said lord Kennedy asked me, the notary public underwritten, to make a public instrument for him concerning all these matters. This was done in the tolbooth of the burgh of Dumbarton, year, day and month foresaid, and the fourteenth

barons and freeholders there present; the parties having reentered, the court publicly decreed that, having considered the submission made of consent of the parties and the oaths made thereupon, the said brieve of mortancestor should proceed without delay, without any exception or obstacle whatsoever, to the assize. And at once the said lord justiciars, by virtue of their office and according to the mandate of our supreme lord the king addressed under his signet and subscription manual, caused choose a worthy assize of the good and faithful men whose names follow, viz, Sir John Maxwell, knight, Robert Cunningham of Cunninghamhead, John Barclay of Kilbirnie, Robert Crawford, Robert Muir of Polkelly, Master Adam Cockburn of Skirling, Thomas Lowis of Mennare, Thomas Menteith, James Douglas, Malcolm Milery, Malcolm McFarlane, Duncan Napier of Kilmahew, Patrick Galbraith, Patrick Colquhoun, John Blair, William Arthurson, Angus Campbell, Alcuin of Arngapil, John Lyle, Andrew Galbraith, Gilbert Galbraith, Walter Noble, Nirdane Buntayne, John Handasyde of Bulule and John Champnay. Which assize, diligently consulted and fully advised by both sides, having heard and fully understood the charters, letters, evidents, rights and muniments of the said lord Kennedy, and having considered what ought to be considered in this matter, decreed and by its bodily oaths passed judgment and delivered that the late Sir Gilbert Kennedy knight, grandfather of Gilbert lord Kennedy bearer of the presents, died vest and saised as of fee of the lands which are called Easter Mains, Wester Mains, Shirva, Bar, Bedcow and Wester Gartshore with the pertinents lying in the barony of Lenzie within the sherifffdom of Dumbarton, and that the said Gilbert lord Kennedy is the lawful and nearest heir of the same late Sir Gilbert, his grandfather, of the said lands with their pertinents, and that Robert lord Fleming

indiction of the second year of the pontificate of the most holy father in Christ, Paul, by divine providence second pope of that name. Present the reverend father and lord in Christ, Andrew, by divine permission bishop of Glasgow, Andrew lord Avandale, chancellor of Scotland, John lord Darnley, James lord Hamilton, Robert lord Boyd, Robert lord Lyle, Master James Lindsay provost of Lincluden, and Master Alexander Murray, canon of Moray, with many other witnesses specially called to the foregoing.

(The notarial docquet is by Alexander Foulis, clerk of the diocese of St. Andrews and notary public by imperial authority).

Notes (see text, pp. 209, 213, 241).

A number of other documents relating to the litigation recorded in this notarial instrument still survive. The lands in issue all lay to the east of the modern town of Kirkintilloch, Dunbartonshire and were collectively known as the forty-shilling lands of Kirkintilloch. Of particular interest are the references by Master David Guthrie as Kennedy's forespeaker to Regiam Majestatem and Quoniam Attachiamenta. The first reference to Regiam is to Book I, ch. 11 (Record ed.): 'Nec prejudicabit absentia alicuius partis quin procedat assisa cum se jam de consensu suo posuerunt in assisam'. The second reference is to Book IV, ch. 51: 'Si duo homines ponunt se in inquisicione super aliquod factum inter ipsos, nullum essonium valet quin procedat inquisicio'. This chapter is also found as ch. 47 of Quoniam Attachiamenta.

APPENDIX I

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Dissasine and Mortancestor in Scots Law

H.L. MACQUEEN

(i) *Introduction*

The beginnings of military feudalism in Scotland may be found in the reign of David I (1124-53). Its evolution into a sophisticated system of land law and conveyancing in the following centuries has never been fully explored. Abundant charter and other evidence shows clearly enough that later medieval Scottish land-owners were thoroughly conversant with concepts such as sasine, dependent tenure and its incidents and primogeniary inheritance as major features of that system. But it would be unwise to suppose that when David I inflected (*anglice*, enfeoffed) his knights in the middle of the twelfth century he was minded to introduce a 'feudal system' of landholding as law for all Scotland. That was rather the outcome of various factors in the development of Scottish society and royal government then and at later periods. Not the least important of these, it may reasonably be suggested, was the provision of royal courts and procedures by which the rights of landowners might be defined and enforced. This essay examines two such procedures made available in the king's courts in the thirteenth century, the actions on the brieves of dissasine and mortancestor.

There has been relatively little study of procedure by breve in medieval Scottish courts by comparison with the wealth of literature on the equivalent English procedure by original writ. Forty years ago, Lord Cooper pointed out that a formulary system of procedure had come into operation in Scotland whereby court actions were begun by writs in the name of the king, commanding the judge to determine an issue set out in the document. Such documents were known in the vernacular as 'brieves', a word derived from their Latin name of *brevia*.¹ It was Lord Cooper's belief that, after this system had 'attained its culminating point in the early fourteenth century', it 'fell into decay' and had, with some exceptions, disappeared by the middle of the fifteenth century.² The exceptions were, of course, the 'classical' brieves discussed in Stair's *Institutions* at the end of the seventeenth century - perambulation, succession, tence, division, lining in burghs, tutory and idiotry.³ After the death of Lord Cooper, Sheriff McKechnie demonstrated that the theory of a declining system in the late medieval period was mistaken. In a careful study of a wide range of material, he sought the first appearance of each form of breve and was able

from this to show that the system was apparently still expanding in the fourteenth century and reached what he called its 'heyday' in the fifteenth. He also drew attention to the continuous history of the brieve of right throughout this period.³ Since McKechnie's paper was published, there have been further detailed studies of particular forms of brieve, notably Professor Harding's essay comparing the brieve *de protectione regis infirmita* with the English writ of trespass.⁴ Attention must also be paid to the illuminating work of Professor Barrow on twelfth century developments⁵ and to Professor Willock's careful researches on the 'classical seven' in the medieval period.⁶ However, there remain many gaps in our knowledge, some of which it is hoped to fill in this paper.

There would appear to have been no serious dissent from Lord Cooper's conclusions on the subject of the brieves of dissasine and mortancestor. He recognised their existence in the thirteenth century but, in line with his general thesis, seems to have thought that dissasine fell into desuetude in the fourteenth and fifteenth centuries. Certainly he never carried its history beyond the legislation touching the matter in 1318 in any of his published works.⁷ Professor Walker has since noted a case of dissasine in 1368 and stated that 'it would appear accordingly that novel dissasine fell largely into desuetude round about 1400',⁸ while Professor Willock states that this occurred 'probably in the mid-fourteenth century'.⁹ If Lord Cooper's view of dissasine is somewhat unclear, his thoughts on mortancestor are more easily seen, when he writes:¹⁰

[T]he emphasis appears to have shifted from ejecting the intruder to declaring the title of the heir to succeed. Indeed the term "mortancestor", which is of very frequent occurrence in Scottish charter records of the thirteenth century, was more commonly used not of the original possessor remedy but of the comprehensive *generalis inquisicio*... which became the "brieve of succession" of Balfour... and the "brieve of service" of Stair... and of later practice down to 1847 – the substance of all these being practically identical... concerned solely with the investigation of the heir's title, and there being no intruder to eject. From all this it would seem to follow that by the end of the thirteenth century the original brieve of mortancestor was losing its identity.

Again, a broadly similar conclusion has been reached by subsequent writers, such as Professor Willock:¹¹

The brieve of mortancestor died out at an early date, being, in common with novel dissasine, replaced by such native actions as ejectio and wrongous occupation, but the name had so impressed itself on the legal imagination that it became attached to the related

However the extent to which Lord Cooper's general thesis was undermined by Sheriff McKechnie suggests that his particular conclusions on the subject of dissasine and mortancestor should be examined afresh. In this paper the evidence to be found in the sources suggested by the learned Sheriff – ecclesiastical cartularies, collections of family papers and so on – will be brought together with legislation and legal literature of the period. We are driven to these sources by the unfortunate lack of medieval court records, but enough can be gleaned from them and an occasional comparative glance south of the border to enable us to sketch a rather different picture from that just described.

(ii) *The brieve of dissasine*

The earliest reference to a remedy for dissasine in the Scottish royal courts seems to be in a statute of 1230 which has generally been accepted as authentic.¹² There is no evidence of any earlier forms of brieve dealing with such questions or being in any sense forerunners in style of the brieve as it appears in the formularies of the Ayr and Bute manuscripts. The statute states that when complaint is made to the king or his justiciar of dissasine from any tenement in which the complainant claimed to have been infeft, a royal writ is to be sent to the justiciar or the sheriff commanding them to determine the justice of the complaint. This is to be done by means of a recognition, or jury. Professor Barrow has drawn attention to a case before the justiciar of Lothian begun 'by the lord king's brieve of recognition' before 1242 and suggested that, since it came before the justiciar and involved a *recognitio*, it may have been a case begun by a brieve of dissasine.¹³ On somewhat similar grounds it can be argued that a case before the sheriff of Berwick some time between 1233 and 1235 is possibly another early example of the brieve.¹⁴ This case is especially interesting in that the pursuers claim rights of estovers in a wood at Reston in Berwickshire, which belonged to the defenders, the priory of Coldingham. In England the writ of novel disseisin was used from its earliest beginnings in the twelfth century to protect common rights of pasture,¹⁵ and the author of 'Bracton' argued that it could be used for common rights of all sorts, including estovers.¹⁶ If the view in Bracton was ever adopted in practice, it was obscured in the thirteenth century and the second Statute of Westminster had to declare in 1285 that the assize could be used to recover estovers before the king's justices.¹⁷ Prior to 1285 interference with estovers was dealt with by *quod permittat* writs before the sheriff,¹⁸ which were sometimes known as the 'little writs of novel disseisin' because they were pleaded without an assize in the county court.¹⁹ Can a parallel be drawn with England here, given that the Reston case was heard before the sheriff? The answer is, probably not. Apart from the fact that there is no evidence for any *quod permittat* form in the admittedly much-later Scottish

formularies, the act of 1230 does suggest that the justiciar might issue a brief of dissasine himself, saving the complainant the need to approach the king's chapel (chancery), and in it direct that the case be heard by the sheriff. That such a procedure was followed may be borne out by a letter of Hugh Barclay, justiciar of Lothian, written in 1262, in which he states that he has issued 'two pairs of the king's letters of dissasine' to John Scott of Reston.²⁰ Unfortunately it is not stated in which courts the actions will be heard. Another document dated 2nd August 1247 narrates how Adam Spott impleaded Ranulf of Buncle 'by precepts of the lord king of Scots and of lord David de Lindsay then justiciar of Lothian' for certain lands in Buncle. The case was commenced in the 'county (*comitatu*) of Berwick', which suggests the sheriff's court, although a final settlement was reached in the 'court of the king of Scots' before Lindsay the justiciar.²¹ Possibly then this was a case heard initially before the sheriff on a brief issued by the justiciar. Such a power did have an English parallel, although it should not be pressed too far: 'if the disseisin had been committed during a general eyre in the county, the justices in eyre could issue the original writ themselves, saving the offended party a trip to Chancery'.²² Perhaps then the pursuers in the Reston case had obtained a brief of dissasine from the justiciar addressed to the sheriff and were exercising facilities first made available by the act of 1230.

Another early case of dissasine, this time before the justiciar's court, may be the action in which Gilbert son of Samuel impleaded Maldoven earl of Lennox 'by letters of the lord king' for the lands of Monackennaran in 1235.²³ The case is one for which there is a comparative wealth of surviving documentation. The lands were attached to the church of Kilpatrick which the earl had subinfeudated to Paisley abbey. The rector of the church was the earl's younger brother Dougal, who had alienated the lands to Gilbert. Gilbert's title had been completed by a confirmation from the earl. In 1233 the abbey recovered the lands by action before papal judges-delegate, but Gilbert had remained contumaciously absent from the proceedings, and the secular arm had to be brought against him to enforce the judgment. Perhaps the earl had been compelled by higher authority to eject Gilbert and the latter's reaction had been to bring a brief of dissasine. The case was settled with the earl agreeing to pay Gilbert sixty silver marks for the renunciation of his claim.

If to begin with the sheriff's jurisdiction in dissasine was co-extensive with that of the justiciar, this had ceased to be the position by the early fourteenth century and perhaps before. In the fourteenth century 'registers' the brief is always addressed to the justiciar.²⁴ *Regiam Majestatem*²⁵ and *Quoniam Attachiamenia*²⁶ both state that the action pertains to his court. On this point the treatises are supported by the few cases of which there is any evidence. In 1319 the abbey of Dunfermline and the portioners of the

barony of Fithkil were involved in a boundary dispute. The portioners, dissatisfied with the result of an earlier brief of perambulation, brought another action by a brief of dissasine, which was begun in the justiciar's court.²⁷ In 1342 an assize held in the full court of the justiciar at Inverberry found that Sir William Mowbray had dissatisfied the abbot and convent of the abbey of Arbroath unjustly and without a judgment of various lands in the Mearns.²⁸ In 1368 Thomas Hay of Loquharior (not to be confused with his contemporary, Thomas Hay of Erroll, constable of Scotland) brought a brief of dissasine against William Borthwick in the justiciar's court at Edinburgh.²⁹ Finally we know of two cases of dissasine in 1433, both heard before the justiciar north of Forth at Perth.³⁰ A final confirmation of the position can be found in a minor treatise probably written in the 1450s, the *Ordo Justiciarie*, which explains details of procedure in the justiciar's court. This gives a form of summons '*super Breve de Nova Dissasina*'.³¹

It is striking how closely the form of the brief, as it appears in the 'registers' and *Quoniam*, follows the wording of the act of 1230 which speaks, as do the styles, of the pursuer's complaint that he has been dissatisfied by another unjustly and without a judgment and states that a recognition of the good and faithful men of the neighbourhood should be held to make inquiry. If the complaint is found to be true, the pursuer is to be restored to his former sasine; if not, he is to be put in the king's mercy. In general the inspiration of the English writ is clear, both in the act and in the styles. It is tempting therefore to assume that the brief took this form immediately. If so, many of the thirteenth century briefs and cases which previous writers have thought to be examples of the brief of dissasine can be disregarded. This is particularly so where the brief in question is retourable (returnable to the king's chapel); the brief of dissasine was a pleadable brief and thus not retourable.

The form appears to have been identical whether the brief was called one of novel dissasine, as in the 'registers', or simply dissasine, as in *Quoniam*. The earliest direct reference, in 1262, is to the 'king's letters of dissasine'.³² In the fourteenth century there are references both to briefs of dissasine (as in the cases of 1319 and 1368 mentioned above) and to briefs of novel dissasine. Thus the 1318 legislation of Robert I speaks in two chapters of the brief of novel dissasine,³³ while in 1328 the abbey of Arbroath and its men were given temporary exemption from all suits or complaints to be brought against them, excepting only actions begun by briefs of novel dissasine or *terce*.³⁴ This document may suggest that the 'novel' element had substantive consequences in that the action might become time-barred, as in England. But the only Scottish source to refer explicitly to a time-limit beyond which novel dissasine was not available is *Regiam* which, in a passage borrowed from Glanvill, states that the time-

limit was fixed periodically by the king's council.³⁵ It is perhaps important that by 1230, when the Scots introduced their remedy, the English had begun to relax the strictness of the requirement of 'novelty'. In that year a plaintiff could sue on a disseisin ten years old, while from 1276 to 1546 the time limit beyond which novel disseisin could not go was May 1242;³⁶ thus, as Professor Sutherland remarks, 'in the fourteenth and fifteenth centuries the assize was for practical purposes free of any time limitation'.³⁷ In the absence of any specific evidence on time-limits in Scotland, it may well be that in fact there were none, but that does not mean that the word 'novel' was wholly without meaning. A document of 1434 which refers to two separate actions in the previous year, one begun by brieve of dissasine, the other by brieve of novel dissasine, suggests that there was some kind of formal distinction based on 'novelty'. This thought is supported by the fact that the ejection complained of under the brieve of dissasine had occurred seventy years previously. Unfortunately the document tells us nothing about the other brieve, but it seems reasonable to suppose that there the ejection had been a rather more recent event.

This evidence shows that by the fifteenth century the brieve could stretch a long way back in time; a careful study of the 1318 legislation on dissasine suggests that this was also the case in the thirteenth and early fourteenth centuries. There are two acts dealing with the brieve of novel dissasine, of which the first, chapter thirteen, is relevant to the point under discussion.³⁸ It can be divided into five main sections, two of which are particularly revealing as to the question of time-limits in Scotland. The first of these begins by explaining current practice, that the brieve is only used against one who entered either by his own wrongful dissasine or through infelment by another. This seems to mean that before 1318 the current possessor was named as the dissaisor in the brieve, regardless of whether or not it was he who had originally ejected the pursuer. But the act states that this practice is to be changed: the original dissaisor and the feoffor (if alive) are to be named as defenders alongside the current possessor.

We can best understand the significance of this provision by looking at thirteenth century English developments. To begin with, one disseised could only name his disseisor as defendant, but success in this action enabled him to recover from any third party put in after the disseisin. But about 1212 a new rule emerged, that the plaintiff should name both disseisor and any such third party in his writ, since the old law in effect meant that the latter could be put out of his holding without writ and by judgment in a suit to which he was not a party. Professor Sutherland has argued that this new rule was also a consequence of the lengthening time limits within which the assize could be brought. The old rule had come to operate unfairly, 'for the third party who was holding the land might have come in years after the disseisin and held in good peace for a long time

before the assize was brought'.³⁹ Towards the end of the thirteenth century, in another reflection of the expansion of the time limits, the law was further developed to meet the contingency of feoffees intermediate between the disseisor and the current tenant, requiring the plaintiff to name them if they were alive.⁴⁰ Novel disseisin was thus available even though so much time had passed that feoffees of the disseisor had died and their heirs had come into possession. It was however always essential to name the disseisor: 'the form of the original writ was never adapted . . . to make any room for a defendant who was named simply because he was tenant and not because he was supposed to be guilty of disseisin'.⁴¹

The 1318 act can therefore be seen as a second attempt to solve a problem created by the lengthy period within which the action of dissasine was competent in Scotland also. The first solution had been sharply distinct from that developed in England and may suggest that the act of 1230 did not after all establish the brieve in its final form. The second solution is an adoption of the English rules as they had stood from the late thirteenth century; as we shall see, this characterises the whole of the act.

The next provision deals with dissasines carried out by several persons. If the principal dissaisor were to die before the disseisee had recovered his estate then the action could be brought against any living person who had taken part in the dissasine, or who was a tenant of the lands in the life of the principal dissaisor. Again passage of time between the dissasine and the raising of the action is implied. The act was following English precedent established in the reign of Edward I (1272-1306) and as Professor Sutherland notes the development allowed the assize to be used long after the original disseisin.⁴² The point is reinforced when it is noticed that here the act makes an exception to its earlier provision about who should be named in the brieve. Actions may be directed against one who has become a tenant after dissasine by a group without bringing in any of the other parties involved. However we can derive one time limit, albeit not an especially severe one, from this provision. The act expressly states that it is to prevent the disseisee losing his right of action on account of the death of the principal dissaisor 'that he is enabled also to sue the other participants or the tenant. The implication is that the brieve of dissasine was only competent during the lifetime of the dissaisor, a rule similar to that of English law. It looks as though this rule was part of pre-1318 Scots law and it would accordingly have been a major feature distinguishing the brieve of dissasine from the brieve of right in the thirteenth century.

The act goes on in its third provision to discuss the position of the tenant sued as a result of the death of all those involved in the original dissasine. He may if he wishes take out a brieve of warrantice of charter against the person who infel him, or his heirs; nevertheless, says the act, the assize is to proceed against him at the first day of pleading. It was of the essence of

dissasine in Scotland, as in England, that no essonizes, or excuses from appearance, were allowed to the defender and that the case should be determined on its first day in court. We can see this rule in operation in 1433 when it was only with the consent of the pursuer that his case of dissasine was continued to a second day.⁴³ Nothing was to delay the action and the Glanvillian rule that the tenant who calls a warrantor in disseisin loses the action immediately is found in *Regiam Majestatem* also.⁴⁴ Thus the warrantor could not take over the defence of the action in place of the tenant. In thirteenth century England however it became possible for the tenant to start a separate action against his warrantor by the writ *warrantia carte*: if he lost in the assize, he would then be able to recover from his warrantor lands elsewhere of equal value to those from which he had just been put out.⁴⁵ This is the position which the Scottish act seems to achieve. It is not known when the brief of warrantice of charter was introduced; it appears in the Ayr manuscript as a form of writ *de compulso* in the name of king Alexander, implying a thirteenth century date.⁴⁶ Other evidence shows that generally the effect of raising a brief of warrantice was to sist or suspend the principal action:⁴⁷ the effect of the act is therefore to preserve the special position of dissasine with regard to warrantice, but also to permit the deflection of the burden of the action from the tenant infet after dissasine by a group.

It has been said that the 1318 act altered procedure in dissasine 'in favour of the dispossessed pursuer'.⁴⁸ But our interpretation of its provisions so far suggests a different conclusion, that the act favoured the sitting tenant who had come in after the dissasine. In general the pursuer had to search out the other parties involved and bring them into his action. A crucial consequence was the spreading of the pains of losing the action, either by use of the brief of warrantice in the case of the tenant infet after dissasine by a group, or, in other cases where the tenant had been put in after any form of dissasine,⁴⁹ by allocating the damages amongst the parties involved. This is provided for by the act which states that the dissasinee shall recover damages from each of the dissasors in proportion to the time which each of them spent in the lands. We do not know how the *quantum* would have been assessed – *Regiam Majestatem* states a maximum of ten marks, but *Quoniam Attachiamenia* allows recovery of the whole of the pursuer's loss through his exclusion⁵⁰ – but this reduction of his liability must have been one of the most important consequences of being merely a co-defender for the losing tenant. The provision also underlines the point that actions of dissasine knew no formal time limit.

If it is asked why the legislators of 1318 should have wished to give this kind of protection to tenants who had entered their lands after a dissasine, the political situation of the time should be borne in mind. Following his triumph at Bannockburn in 1314, Robert I had his parliament declare that

all those who would not come into his peace should be forfeited. Those who held lands in both Scotland and England had to choose for the first time to which crown they would in future give their allegiance; those who chose to be subject to the English king would lose their Scottish lands. This had happened to many who had been put out in the wars from 1296 onward, and the lands had been granted out instead to Robert's supporters. This, coupled with a return of the former owners to Scottish allegiance after 1314, led to a complex situation which has been fully discussed by Professor Barrow. He concludes that King Robert held fast to the principle that there should be no disinheritance of men and women claiming property by hereditary right, provided that they were prepared to swear allegiance to him.⁵¹ Such a policy must have led to clashes of interest between those disinherited during the wars and those who had gained possession as a result, in which perhaps the former might have raised actions of dissasine to recover their lands. It is surely against a background where the king's loyal adherents (and their tenants) were uncertain to what extent they would be able to retain their new lands against the returning disinherited that chapter thirteen of the 1318 legislation was enacted. This would explain its preoccupation with old dissasines. A similar rationale may well underlie chapter nineteen, the other act of 1318 dealing with dissasine: the defender here, as in briefs of right and mortancestor, was to have full opportunity to consider the case against him and to state his own position.⁵²

There are of course provisions in the 1318 act which clearly favour the pursuer, for instance where the dissasine had been carried out by a group. The final provision of the act also lays down a rule which, while not strictly in favour of the pursuer, is a harsh measure against the dissasor. Those who are found to be dissasors *cum vi et armis* after the publication of the statute are to be imprisoned (*adjudicatus ad personam*) and are also liable to a major amercement or fine at the king's will. This appears to add to the Glanvillian rule stated in *Regiam*⁵³ and echoed in the brief itself that the guilty defender must pay a fine to the king's use, by imposing a stricter penalty on those who dissasine with violence. Was this intended to deter those of the disinherited who might be tempted to self-help? If so, it may well stand alongside chapter twenty-five of the 1318 legislation which affirmed the rule that no man was to be put out of his freehold without the king's brief.⁵⁴ The provision ought also to be interpreted in the light of the act of which it is part and which is intended to create joint liability amongst the original dissasor and those who derived their title to the lands from him. Such subsequent tenants are also dissasors liable under the brief, but they did not dissasine *cum vi et armis*; that would be most likely to happen in the act of ejecting the person who is now the pursuer. Thus it would be the original dissasor rather than the current possessor who would

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be liable to this penalty. Again therefore the policy of protecting the tenant is apparent; it is also noteworthy that in framing this reform an English provision, the first Statute of Westminster of 1275, was being followed.⁵⁵

Much can be learned of the substantive effect of the brieve both before and after 1318 from this legislation: more can be discovered from looking at the form of the brieve itself. The style in the Ayr manuscript says that the pursuer must have been vest and saised of the lands as of fee or as of terre (*dote*) or by a rent (*firma*) the term of which has not yet expired.⁵⁶ This last suggests another interesting contrast with England where only the life-tenant and tenant *pur autre vie*, and not the mere termor, were protected in their seisin by the assize;⁵⁷ but there is no further Scottish evidence on this point. In *Quoniam* the brieve states that the pursuer must have been vest and saised as of fee,⁵⁸ while in the Bute manuscript the formula is simply, that the pursuer was vest and saised of the lands.⁵⁹ It is difficult to draw any clear picture from this what interest in the lands a pursuer had to show he held before the dissasine. Something can perhaps be made, however, of a *Regiam* passage which Lord Cooper treated with some scepticism. This states that the brieve of dissasine 'touches only *liberum tenementum*'.⁶⁰ It is apparent that in later medieval Scotland '*liberum tenementum*' meant in effect any life interest in land, whether or not that interest was heritable. A common example from the fourteenth century onwards is the life-rent which fathers often reserved to themselves when granting the fee of their lands to their sons.⁶¹ In England the assize protected freeholdings – including any tenancy for life – and it would be surprising if the Scottish brieve was not of comparable scope. Terre, the widow's liferent of part of her husband's estate, is specifically referred to in the Ayr manuscript. In 1368 the lord of Menleith complained before the king and parliament that his wife was being excluded from her terre of a former marriage by Archibald Douglas.⁶² It was successfully argued that he should have recourse not to parliament but to the common law in the justiciar's court: does this mean that the appropriate remedy, given that the lady had already been served to her terre, would have been a brieve of dissasine?

In this context it is of interest to note a statute of 1434 which introduced the brieve *de aqueductu* into Scottish practice.⁶³ The brieve was clearly modelled on that of dissasine. It began by narrating the pursuer's grave complaint that he had been disturbed and molested unjustly and without a judgment in his possession of the waterway at his mill. The court was instructed to restore him to his possession if the complaint was true.⁶⁴ Perhaps the reason for this legislation was a decision that such a possession was not a freehold recoverable by the brieve of dissasine. If so, the position may be contrasted with that in England, where the assize seems to have been available for diversions of watercourses.⁶⁵

What seems to emerge from this is a fuller understanding of what was

meant by contemporary writers when they spoke of dissasine as a possessory remedy. It was not that the pursuer need only be someone who had had possession, with or without right thereto. Rather it was that the pursuer did not have to show his heritable title, or fee. Medieval jurists battled to fit the realities of their land law into the sharp Romanist contrast of ownership and possession: ownership meant heritable title, therefore all else must be possession only. But even in Scotland with its relatively simple structure of interests in land that dichotomy did not fit the facts of legal life. To say that a man was not a proprietor did not preclude his having some other interest in or claim to the land; many of these he could recover, even against the heritable proprietor, by the brieve of dissasine. Indeed it may not have been uncommon for, say, a tencer to recover against the person who held the fee. But it is a long way from that to say that someone who had gained possession without any shadow of right could bring the brieve successfully when he was turned out by the true owner. Professor Sutherland has shown us that, no matter what Bracton might have said, in England the mere wrongful possessor was not normally protected by the assize against disseisin by the true owner;⁶⁶ it is probable that the position was the same in Scotland.

In any case it is clear that dissasine in Scotland was far from functioning as a merely 'possessory' remedy. As Maitland remarked 'a possessory action is likely to lose some of its possessory characteristics if the plaintiff is suffered to rely on ancient facts'.⁶⁷ It is clear from the 1318 legislation that even before that time the action enabled a challenge to another's title to land if its ultimate source lay in a dissasine of the pursuer by someone who was still alive and, from 1318, named in the brieve. That event need not be and often was not a recent one; again we can refer to the 1433 case where the action was brought seventy years after the dissasine. Chapter nineteen of the 1318 legislation shows us the brieve of dissasine being treated as essentially similar to the briefes of right and mortancestor: surely this is because they were seen by practical men of the time in this way, as means of vindicating claims to land, to be variously used according to the nature of those claims.

Briefes of dissasine, novel or otherwise, were still known in mid-fifteenth century Scottish legal practice and, to judge from the cases of 1433 and the *Ordo Justiciarie*, terminology and procedure had changed little since its introduction in 1230. But to the best of my knowledge there are no subsequent references to this form of action and it must be assumed that sometime in the second half of the fifteenth century the brieve began to fall out of use. A statute of 1504 envisages the pursuit of pleadable briefes (note the plural) in the justiciar's court.⁶⁸ We know of three, possibly four, pleadable briefes which were taken before the justiciar: *perambulatio*, (which continued in use throughout the sixteenth century), *de protectione*

regis infidelis (which may have been abolished in 1430 and is not mentioned in the *Ordo Justiciarie*), mortancestor (of which, as we shall see, there are cases in the later fifteenth century) and dissasine. Possibly therefore the 1504 act implies the continued use of the breve of dissasine. But if not already gone it was undoubtedly passing out of legal currency. The formulary which contains styles of various pleadable briefes in use by the regality chancery of the archbishop of St. Andrews about 1520 has no form of dissasine, although it does include others for right and mortancestor.

(iii) *The breve of mortancestor*

In many ways the story of the breve of mortancestor seems to parallel that of dissasine closely. There is a reference which establishes its existence in Scotland in the mid-thirteenth century. In 1253 Emma of Smeaton sued the abbey of Dunfermline by royal letters of mortancestor, claiming lands in the fee of Musselburgh which had been held by her father.⁶⁹ The case was settled, but it is clear that the basis of Emma's action was, as one would expect with mortancestor, a claim to succeed to an immediate ancestor who had died vest and seised in lands which were now being unjustly withheld by some unentitled person. This is also the substance of the breve as it appears in the registers⁷⁰ and as it is described in *Regiam* and *Quoniam*.⁷¹ As such the breve is obviously modelled on the English writ of *mori d'ancestor*. Its difference from the breve of succession, as we shall call it,⁷² is also plain. By the breve of succession an individual established his title to inherit a deceased person's lands. This seems always to have taken place in the sheriff court. It was a formal procedure, the result of which would be returned to the king's chapel. A precept of sasine would then be issued ordering that infetment of the heir take place. A breve of mortancestor was pleadable and not returnable: the successful pursuer was given sasine immediately. The action was directed not only at establishing the claim of the heir but also at ejecting an intruder who was summoned to defend the action.

Like dissasine mortancestor proceeded without essonzie, although, as we have seen, in 1318 it was laid down that the defender should be given an opportunity to hear the breve and to consider the case against him.⁷³ The action was heard by an assize of the good and faithful older men of the neighbourhood. Its scope was widened in another act of 1318 so that an action could be brought by a pursuer tracing his right to succeed from grandparents as well as from parents, uncles, aunts and siblings.⁷⁴ As Lord Cooper noted, this brought Scots law into line with the position already achieved in England. There the writ of *mori d'ancestor* was similarly limited to begin with; the person drawing his right from the seisin of grandparents and other more remote relatives was first offered protection by the writs of *aitel*, *besailel*, *treasail* and *cosinage* about 1237.⁷⁵ This

suggests that the Scots' initial adoption of *mori d'ancestor* took place before that date, perhaps at about the same time as they borrowed the breve of dissasine. Finally, this 1318 act, by contrast with that on dissasine, is surely in favour of the disinherited returning to Scotland after 1314 to reclaim lands after the dislocation of the wars of independence already discussed.

There are perhaps a couple of examples of a breve of mortancestor preceding the case of Emma of Smeaton in 1253. One is the case about estovers already mentioned in the discussion of dissasine. A breve of mortancestor, like one of dissasine, was one of recognition.⁷⁶ What suggests that the breve of recognition in the estovers case might be one of mortancestor is the word used to describe the parties raising the action. The word is *petentes*, translated in England as 'demandants' and said to be appropriate for *mori d'ancestor* but not for novel disseisin where instead one speaks of the plaintiff or *querens*. This follows Bracton's learning that novel disseisin is a possessory action whereby one complains of an essentially personal wrong while *mori d'ancestor* is petitory and does not necessarily reflect on the conduct of the other party. But, as Maitland pointed out, this sits uneasily on the reality of the two actions. In Scotland it is even less clear whether the language used to describe the parties has any significance of this kind. In the later medieval period, the normal Latin usage was that of *actor* and *reus*, without any apparent variation amongst the forms of action.⁷⁷ It is not impossible however that the estovers case was one of mortancestor. There are some early thirteenth century cases where estovers were recovered by *mori d'ancestor* in England,⁷⁸ although later this function was taken over by *quod permittat* writs in the nature of *mori d'ancestor*, and was not regained under the second Statute of Westminster.⁷⁹ Another possible case from the middle of the thirteenth century is the action which Mariota daughter of Samuel raised by royal letters against the bishop of Glasgow concerning the lands of Stobo in Peeblesshire. Mariota and her sister's son both eventually quit – claimed the bishop of the lands; it is thus possible that the basis of her claim was a right of inheritance derived from Samuel. Accordingly, as Professor Barrow has suggested, this may have been a case of mortancestor.⁸⁰ If so – and we cannot be sure – then it seems that in its early days mortancestor, like dissasine, might be taken in the sheriff court.

However the *Regiam*, the *Quoniam*, the registers⁸¹ and surviving examples of the use of the breve from the fourteenth century show that later it pertained only to the court of the justiciar. A writ in the Bute manuscript directs the sisting of procedure before the justiciar in a breve of mortancestor.⁸² In 1321 two justiciars were assigned to hear the cause of John de Mora against Sybil de Quarentely and John Cissor on a breve of mortancestor. The doom given stripped the defenders of their lands.⁸³ A

document dated 10th December 1368 and printed for the first time recently follows the style of the brieve of mortancestor in the Ayr manuscript almost exactly. It is addressed to three justiciars and commands them to hold a recognition of the good and faithful and old men of the country to see whether the late William Douglas of Liddesdale, uncle of the pursuer, died vest and saised as of fee of lands in Peeblesshire. If so, and if the pursuer, James Douglas of Dalkeith, is his lawful and nearest heir, and if Roger Carruthers with his wife Isabella is unjustly detaining the lands then the justiciars are to put Douglas into the lands so that he holds as his uncle did on the day when he was alive and dead.⁸⁴ In an interesting document of 1390 Murdoch Stewart, justiciar north of Forth, narrates how Thomas Hay of Erroll, the constable, presented a brieve of mortancestor against William Keith the marischal in the full court of the justice-ayre at Dundee. It is explained that the brieve had been led before the justiciar on two previous occasions, and the dooms given (presumably on preliminary pleas) had both been falsed in parliament. Now the brieve is put to an assize of the best and worthiest of the country, who find that Thomas is the lawful and nearest heir of his grandfather John Keith in the lands of Innerpeffray in Perthshire and that William is unjustly detaining them. Thomas is to have the sasine which his grandfather had on the day when he was alive and dead.⁸⁵ This appears to be a classic case of mortancestor and an application of the statutory provisions of 1318. Murdoch Stewart heard another such case in 1397 in his capacity as justiciar north of Forth, when Alexander Murray of Colbyn and William son of John of Badfothal sought to recover the third part of the barony of Badfothal by a brieve of mortancestor. They alleged that Michael Mercer was unjustly detaining these lands. An assize found that Marjorie, the pursuer's grandmother, died saised as of fee of the third part of the barony and that as Alexander and William were the lawful and nearest heirs they should have sasine and heritable possession.⁸⁶ It seems clear that when in 1369 James Douglas of Dalkeith and William Cressvyle agreed to have the controversy between them over the lands of Robertson in Lanarkshire settled by a brieve of mortancestor, the case would have been heard in the justiciar's court.⁸⁷ It is also apparent that at the end of the fourteenth century that brieve retained a character quite distinct from that of the brieve of succession.

We can therefore correct what it is now apparent is an editorial slip in the sixth volume of the *Regesia Regum Scottorum*. It is clearly wrong to index the brieve of 1368 referred to in the previous paragraph as a 'brieve of inquest'. The same observation holds good of a fragment printed in that volume which is also indexed as a 'brieve of inquest' (presumably meaning brieve of succession).⁸⁸ This is addressed to the justiciar south of Forth who is commanded to recognise by good and faithful and elder men of the country whether the late John Helbek, brother of the bearer of the brieve,

Matthew Helbek, died vest and saised as of fee in Calderside in Lanarkshire.⁸⁹ Nothing else survives of this brieve, but there is more than enough to show that it is one of mortancestor properly speaking, and that it went on to suggest that someone was unjustly withholding the lands from Matthew.

When we move into the fifteenth century, we find it quite clear that the brieves of succession and of mortancestor continued to be distinct entities. In the late 1430s William Douglas lord of Drumlanrig recovered from Janet Murray certain lands near Hawick in Roxburghshire in which his father had died vest and saised as of fee and which Janet now unjustly detained. The action was begun by brieve of mortancestor and decided in the justiciar's court. In the collection where the record of this case is printed there immediately follows an example from 1438 of proceedings by brieve of succession where a person was served heir to lands in which his father had died vest and saised as of fee. This took place in the sheriff court and there is no mention of any intrusion upon the lands by some unentitled person.⁹⁰ Whether or not the juxtaposition is intentional, it shows clearly the survival of the distinction between brieves of mortancestor on the one hand and succession on the other.

Other fifteenth century evidence shows the brieve of mortancestor continuing to wear its badges of identity, namely, the existence of an intruder defending the action and the jurisdiction of the justiciar. The *Ordo Justicie* provides a form for the summons of the defender on a brieve of mortancestor,⁹¹ and we have an actual example of such a writ from 1467. In it William Edmonstone of Duntreath, justiciar south of Forth, commands the sheriff and bailies of Lanark to cause the parties to a brieve of mortancestor of the lord king's chapel to compare before him at the next aye at Lanark for the determination of their case.⁹² A year earlier Gilbert lord Kennedy had recovered certain lands from Robert lord Fleming by brieve of mortancestor pursued in the court of the justiciar at Dumbarton. It was found that Gilbert's grandfather had died vest and saised as of fee in the lands and that Robert was now unjustly detaining them.⁹³ This looks identical to the cases of 1390 and 1397 referred to earlier.

It is of some interest therefore to study a case of 1471 in which Andrew Bisset came before the auditors of parliament to false a doom which had been given in the justice-ayre of Cupar upon a 'brief of mortancestry'. The auditors referred the question to the next parliament because they could 'nocht now be avist be the lawys that thai find written to declare quhat order and proces salbe had in the proceeding of the said brief'.⁹⁴ On the face of it this would suggest that mortancestor was becoming obsolete, but such a conclusion is not borne out by parliament's subsequent actions. A statute was passed, the order and form of which were 'to be observit and kept in all points in the proceeding of the brief of mortancestry purchast be Andro

Bissate agane the lord of Ardros and now dependand in the justice are of Couper', as well as in the pursuit of pleadable briefs generally. The doubt of the auditors seems therefore to have concerned a general point, rather than being the result of a revival of an outmoded form of action. This is confirmed by the tenor of the statute itself, which deals with the formalities of pleading and falsing the doom. If an exception was made by the defender, judgment would have to be given thereupon and that judgment might ultimately be falsed. But parliament ruled that if the doom were finally falsed in the pursuer's favour, that was not to conclude the whole action for him: the parties were to return to the justice-ayre and continue the action. 'Tha sal pas ordourly furthwart fra excepcioun to excepcioun how oft that ever the dome be falsit on to the time that the brief be brocht to the recognicion of an assize'.⁹⁵ Thus the doubtful question related to procedure and pleading, not to the nature of mortancestor. Bisset's action seems to have progressed slowly to its conclusion. In 1478 he again falsed the doom before the auditors, who declared that the decision of the justice-court 'upoun the breve of mortancessour... was evil gevin and wele agane sayd... for diverse and many resonis'.⁹⁶ There is no sign in the records of this case that the breve of mortancestor was even beginning to lose its identity, although we can perhaps see reasons why potential litigants might wish to use other, speedier remedies.

We are now in a position to re-examine a statute of 1430 first printed by Professor Dickinson, which states that 'fra hyne furth thar sal na bref of mortansister pass fra the kyngis chapel bot in maner and furm as his ordanit in Robert the Brouys statuis, that is to say, of lineale successioun and nocht of tayze'.⁹⁷ Professor Dickinson's analysis of the statute proceeded to some extent on the basis that by this time the breve of mortancestor was identical in effect to the breve of succession. However it is now plain that the statute is referring to the pleadable breve which enabled heirs to recover from intruders the lands of which their ancestors had had heritable sasine. It would seem that the policy behind the statute is to restrict the scope of the breve rather than being, as Professor Dickinson thought, some sort of attempt to undermine entails, and indeed this is a much more intelligible explanation of it than the one he offers.

The statute offers interesting support to the thesis tentatively advanced by a number of writers that in medieval Scotland the entailed fee was not distinguished from the fee in which inheritance was unrestricted and determined by the rules of the common law.⁹⁸ The *Regiam* states that mortancestor 'touches' fee and freehold and that in this it 'exceeds' novel dissaine which touches only freehold.⁹⁹ What this means is that in mortancestor the pursuer's claim was necessarily to a fee or heritable title, based as it was on the claim to inherit from a deceased ancestor, whereas, as we have seen, in dissaine the title claimed by the pursuer did not need to be

a heritable one. The suggestion that prior to 1430 one whose claim to succeed arose not through the ordinary rules of primogeniture but through the provisions of an entail could enforce his right against intruders by the breve of mortancestor is borne out by the action which James Douglas of Dalkeith brought against Roger and Isabel Carruthers in 1368.¹⁰⁰ Douglas, it will be recalled, sued in right of his uncle, William Douglas of Liddesdale. Now when William died in 1353 he left a daughter Mary who inherited his lands. But in 1351 William had granted the lands which were to be contested in 1368 to James, with the proviso that James would take only if William died without male issue. There were several other provisions to ensure the succession of heirs – male.¹⁰¹ Mary Douglas died in childbirth in 1367, which actually left James as the heir of line, entitled to all the heritage that had belonged to William.¹⁰² But he did not make his 1368 claim as Mary's heir, but directly as William's. James' action was thus based on the entail of 1351. Indeed it seems likely to have been the outcome of a conflict over the lands between James and Mary. If Mary had claimed the lands as her-general and put in the Carrutherses as her vassals, then if James were her heir he would be bound to warrant their title. If however Mary had no right over the lands through the 1351 entail, then James could get rid of her feoffees as intruders. Regrettably we can only speculate as to whether facts like those suggested lie behind our records of this case; but it can be said that James' action appears to be based on his right as heir of entail to William rather than on the other right available to him as heir of line to Mary. An action of mortancestor, moreover, implies that James had never had sasine of the lands he claimed.

In England by this time the heir of entail was confined to his remedies by the writs of formedon under the famous statute of 1285, *De Donis Conditionalibus*,¹⁰³ although it is worth noting that prior to its enactment, *mori d'ancestor* was competent where the issue in tail were heirs general and their ancestors had died seised.¹⁰⁴ In Scotland, entails were generally in favour of the male line of heirs and failure of that line was comparatively rare. This, coupled with the much greater control of alienation exercised by Scottish superiors by contrast with their English counterparts, probably accounts for the lack of difficulty experienced with entails in Scotland and certainly explains why mortancestor continued to be a most appropriate form of action for the heir of entail seeking entry against an intruder. Even after 1430 where the persons of the heir general and the heir of entail merged in one man, then mortancestor could be used without infringing the statute. Thus in 1466 Gilbert lord Kennedy brought the breve against Robert lord Fleming not only as his general but also as his under an entail of 1385.¹⁰⁵

It was *De Donis* which was primarily responsible for the development of the concept of the fee tail in England and the consequent elaboration of the

doctrine of estates in land. It is most unlikely that the Scottish act of 1430 had or was intended to have a similar effect. No new remedy was offered to the heir of entail unable to gain entry against an intruder or to use mortancestor as heir general. This seems to leave the brieve of right as the only available remedy, but, if so, that would not have led a lawyer to suppose that the entailed fee was different in kind from a fee the succession to which was open to heirs general. The brieve of right also protected heirs with such a claim. Our lawyer would merely have seen the interposition of a longer procedure between the heir of entail and the realisation of his right.

In conclusion there can be little doubt that the brieve of mortancestor remained in use as a distinct form of action until the end of the fifteenth century. The sources give no direct information on its operation after 1478, but as already mentioned the act of 1504 on falsing dooms does suggest that some pleadable brieves were still being addressed to the justiciar's court at the beginning of the sixteenth century.¹⁰⁶ The appearance of a style for the brieve of mortancestor in the St. Andrews formulary, identical with those in the Ayr and Bute manuscripts and in *Quoniam*, underlines the point that the argument from relative silence can cut both ways.¹⁰⁷ In the latter part of the sixteenth century, however, neither Ballour nor Skene was aware of any difference between the brieve of mortancestor and the brieve of succession and plainly by their time the true nature and effect of the former had been forgotten.¹⁰⁸

(iv) *Conclusions*

We have seen that the brieves of dissasine and mortancestor survived as distinct remedies in Scots law much longer than has hitherto been realised, with little external sign of change. So far as can be told, the styles of the brieves remained the same throughout. Perhaps to begin with, in the mid-thirteenth century, they were taken in the courts of either the sheriff or the justiciar, but they always pertained to the latter's from the beginning of the fourteenth century. The brieves provided means whereby land might be recovered from a person who could be described as an intruder, either because unjustly and without a judgment he had ejected the pursuer who had had sasine of a freehold, or because he had entered upon lands which the pursuer was entitled to inherit from a deceased ancestor.

The appearance of unchanging form may however disguise significant developments in the use to which the brieves were put. The question is raised by the important work of Professor Milson on the early history of the equivalent English writs.¹⁰⁹ He argues that to begin with both actions were really attempts to curtail abuse by lords of their powers of control over their tenants and the lands which those tenants held of them. Thus a tenant was enabled to sue the lord who put him out without cause or due process

by bringing novel disseisin in the king's court. The lord whose tenant died had to put in that tenant's heir or else be liable to an action of *mortd'ancestor*. There is no doubt that in England these actions were used by tenants against their lords and it looks as though this also happened in Scotland. Thus the act of 1230 which apparently introduced the brieve of dissasine begins, 'If any man complains to the lord king or his justiciar that *his lord* [emphasis supplied] or any other has dissaised him unjustly and without a judgment . . .'. When in 1253 Emma of Smeaton brought a brieve of mortancestor against Dunfermline abbey to recover lands which had belonged to her father, she was in fact suing the superior of whom her father had held the lands.¹¹⁰ Some of the other early cases involving brieves are also interesting in this regard, in particular the one in which Eda, Mary and William of Paxton sought to regain their right of estovers in the wood of Restonside against the priory of Coldingham. In English law, estovers was the right of a tenant to take wood from his lord's estate so far as necessary for the repair of houses, hedges and agricultural implements.¹¹¹ This is clearly what is meant by estovers in our case, where the pursuers were allowed reasonable estovers for the construction of houses, hedges and ploughs, and seem to have held their lands of Paxton as vassals of the priory.¹¹² Another document allows us to see that other tenants of the priory also enjoyed such estovers in Restonside.¹¹³ Professor Milson has argued that the use of novel disseisin to protect such rights of common shows the action's 'feudal orientation', because typically the common, whether it was a pasture or a wood or some other, would be controlled by the lord.¹¹⁴ Clearly there is just such an orientation in this estovers case.

A claim by a tenant against a lord to a right of common may also lie behind the action, perhaps one of mortancestor, which Mariota daughter of Samuel brought against the bishop of Glasgow concerning the lands of Stobo. Stobo had been part of the bishop's demesne from very early times,¹¹⁵ and it is described as his manor (*manerium*) in this dispute with Mariota.¹¹⁶ Between 1208 and 1214 a neighbouring landowner claimed common of pasture in Stobo¹¹⁷ and there may have been another such claim in the 1220s.¹¹⁸ There is at least a chance that this was also what Mariota sought. The feudal or seigniorial dimension is clearer in the case where Mariota of Chirinside and her son Patrick sued the priory of Coldingham for a ploughgate at Renton. Patrick's father Richard (who was presumably Mariota's husband) is designed 'of Renton' in the record of the case. Lands in Renton would have been held of the priory.¹¹⁹ If this was a case of dissasine, what we may be seeing is a dispossessed tenant and tencer suing their lord to get back into their lands. A clear case of a lord being sued by his tenant, perhaps for dissasine, is the action of Gilbert against the earl of Lennox for the lands of Monachkenneran in 1235. There is perhaps also a feudal dimension in the legislation of 1318. The dissaisor

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who put one person out of and another into sasine of a tenement would most typically be a lord exercising control over his tenants, while the group of dissaisors could conceivably be the lord's court, or following, or officers, with the principal dissaisor being the lord himself or his steward.¹²⁰

That these briefes were used against lords is not of course conclusive evidence that they were created for that purpose. Professor Sutherland has argued against Professor Milsom that the main aim of Henry II and his advisers when introducing the petty assizes in England was to give better legal protection to all freeholders against dispossession from whatever source, lordly or otherwise.¹²¹ To some extent the argument really turns on the extent of lords' powers in late twelfth century England and on whether freeholders had any meaningful rights outwith their lords' courts before the introduction of the grand jury and the petty assizes. It is Professor Milsom's very persuasive point that these institutions effectively created their rights. Now in Scotland we know extremely little of the powers of lords in their courts. All we can say is that the act of 1230 (a date long after the assizes had lost their feudal orientation as a primary feature in England), while it refers to lords as perhaps the prime examples of likely dissaisors, does not restrict the operation of the remedy to such cases, but states that it will operate whenever one is dissaised by another unjustly and without a judgment. And if we can take the 1318 legislation as a retrospective guide to the development of the law in the thirteenth century then the person dissaised could and did bring the action directly against one infet in the land in all good faith after the original dissasine. There was hardly likely to be any existing tenorial link in the land between such parties. Thus even before the act of 1318 the briefe of dissasine was much more of an assertion of an abstract right to land against the equally abstract title of some other person. This remained the position under the act of 1318, as we have already seen.

When we look at the fourteenth and fifteenth century cases it is harder to find any feudal dimension. Most of the cases of dissasine seem in fact to be contests between tenants-in-chief of the crown rather than between tenants and lords, and to be about rights in land rather than the recovery of possession. Thus in 1341 the abbey of Arbroath received royal confirmation of its title to the lands which it was about to recover by briefe of dissasine. After their recovery the abbey leased out the lands as it had been doing since the middle of the thirteenth century. Perhaps the dissaisor Mowbray was a tenant who had stayed on the lands at the expiry of his lease.¹²² The dispute between the portioners of Fithkil (now Leslie in Fife) and Dunfermline abbey in 1319 again involved rights of common in the lands of Goarmilk and Caschieberran (now in Glenrothes, Fife, just opposite Leslie across the river Leven) in Fife. But there would appear to have been no tenorial link between the parties. Rather both had rights and

the question concerned their mutual extent. The boundaries within which each could exercise his rights were initially determined by a briefe of perambulation, but clearly the result left the portioners with a smaller area than they had expected. The briefe of dissasine seems therefore to have been brought to claim ejection from ground in which they claimed common rights and to be essentially a dispute between neighbours. Interestingly it was held that the matter could not be reopened in this way. The case of Hay of Loquharriot and William Borthwick in 1368 was also a dispute between neighbours about rights in adjoining lands. The lands under dispute were those of Middleton, which lie all around what are today the farm of Loquharriot and the village of Borthwick in Midlothian. The evidence shows that the two families were constantly at odds about each other's rights in Middleton and the briefe of dissasine raised by Hay in 1368 was clearly only an incident in a long story about the definition and extent of those rights.¹²³

Similarly the cases of mortancestor often look as though they are about abstract questions of title and right to lands rather than being a merely possessory remedy for disappointed heirs against wrong-doing lords. We can see this sometimes in the language of our records: it is the *droit* of a barony which will be settled by a briefe of mortancestor in 1369,¹²⁴ and it is *complementum iuris* which the pursuers seek under another such briefe in 1397.¹²⁵ Where the background to a case can be worked out in any detail, it is generally a title competition which is laid before us. Take for instance Hay the constable against Keith the marschal in 1390 for the lands of Innerpeffray. Hay's claim was based on the sasine of his grandfather John Keith. John's daughter, who must have been his heir, married Hay's father. But sometime after 1324 we find Robert Keith, the then-marschal and head of the family, entailing Innerpeffray to his heirs-male after the death of his son John (the same John Keith?). Thus the lands passed to his brother Edward who in turn was succeeded, sometime before 1351, by his eldest son William, the defender of 1390. No doubt the Keith claim is explained by the strength of feeling in favour of agnatic succession in Scotland. Its illegality is easy for us to see; it would perhaps have been less obvious in 1390 when William was holding by a title over sixty years old which had been the subject of a royal confirmation.¹²⁶

Clearly then in the later medieval period the Scottish briefes had virtually lost any 'possessory' character which they might have had. But this does not mean that they had also ceased to operate in a feudal context. There was no *Quia Emptores* in Scotland and in the fourteenth century the pivotal role of the lord or superior in the transfer of land, whether by succession, subinfeudation or substitution, was, if anything, strengthened. Heirs had still to seek entry and receive sasine from him, while the consent of the superior to a conveyance *inter vivos* was made even more important

by a series of statutes defining his rights to recognise, or take back into his own hands, lands which had been the subject of unlicensed alienation by his vassal. Conveyancing was thus commonly by resignation *in favorem* followed by a re-grant, or by confirmation.¹²⁷ That the exercise of these powers of control might give rise to a claim under either of our briefs is suggested by two statutes of 1401,¹²⁸ one of which deals with the difficulty experienced by heirs who often find that the lord has infert someone else, and the other of which speaks of 'wilful and secret' recognitions by lords which vex the lieges in their heritage. Mortancestor and dissasine respectively would have provided remedies against such seigniorial wrongs, although they are not mentioned in either of the statutes. Even later, in 1466, when Gilbert lord Kennedy brought a brief of mortancestor against Robert lord Fleming, he was seeking to recover lands which his ancestors had held of the Flemings;¹²⁹ it is significant that to begin with the parties seem to have contemplated action in Robert's court.¹³⁰ Here then the question seems to have been, was Robert entitled to the lands in demesne, or only to a superiority over them? Moreover, even when there was no tenurial link claimed between the original parties in a case of mortancestor, a feudal dimension could come in if the defender called a warrantor. It would seem from a writ in the Bute manuscript that this would suit the principal action until the warrantor appeared to take over its defence;¹³¹ there is here a significant contrast with the position in dissasine. Often the warrantor must have been the superior and the pursuer's case would then become a claim to hold the lands of him. At least this is what we can see happening in a case of 1372 where James Douglas of Dalkeith, who had been impleaded in the justiciar's court for his lands of Morton in Dumfriesshire, brought a brief of warrantance against the earl of March in the sheriff court.¹³² The earl, who had granted the lands to be held of him by Douglas only a few years before,¹³³ accepted his liability to appear before the justiciar. It seems almost certain that the case in that court was one of mortancestor and that it would now become a question of the pursuer's right to hold of the earl.

The evidence is in general too scattered, both in quantity and in time, to allow anything other than educated guesses at changes in the use and substantive significance of the briefs of dissasine and mortancestor in Scotland. We may envy the abundance of material which by contrast is at the disposal of historians of English law. One final point can be made. Professor Sutherland has used the English material for the fourteenth and fifteenth centuries to show how in that period the assize of novel disseisin became the principal vehicle by which title might be tried, before ultimately it was superseded by trespassory actions. By contrast the assize of *mortd'ancestor* fell into obsolescence, along with the writs of right and of entry.¹³⁴ The picture is very different in Scotland, where the brief of

dissasine co-existed not only with the brief of mortancestor but also with the brief of right. Thus a Scot who had a right to enter land without ever having had sasine did not need to bring dissasine against the intruder as did his English counterpart. The Scot could use mortancestor if his right of entry was derived from a deceased relative within the relevant degrees, or the brief of right if his claim was from a more remote ancestor. If the ancestor had been ejected before his death, or had surrendered the lands unjustly, so that it was not possible to say that he had died vest and saised, then again resort would be had to the brief of right. It is probably safe to say that dissasine remained a remedy for one who had had sasine properly speaking and had been put out by someone still alive. If the dissasine had been committed by one who had since died, than presumably the ejected person would usually turn to the brief of right.

The evidence on dissasine and mortancestor discussed in this essay surely shows that for Scotland as for England we must set aside the traditional picture which is suggested by the supposed 'possessory' nature of these remedies, that is of 'an agitated and arid world... in which malefactors hurry about attacking people, ejecting them from their lands, hoping to get away with obvious wrongs'.¹³⁵ Rather we see essentially civil questions - about the rights of lords, about entitlement to inherit, about boundaries - being raised and settled in courts which are operating within a clearly defined system of law. We may never know the contribution which these remedies made to the actual shaping of that law; we can however do rather more than hitherto with the material that remains.

NOTES

In these notes I have used the abbreviations suggested in the *List of Abbreviated Titles to the Printed Sources of Scottish History to 1560* published as a supplement to the October 1963 issue of the *Scottish Historical Review*. References to *Regium Majestatem* and the *Quoniam Attachamenta* are to the editions in the first volume of the *Acts of the Parliaments of Scotland*. I would like to record my indebtedness in preparing this article to my colleagues Professor G. W. S. Barrow, Mr. W. J. H. Sellar and Mr. W. J. Windram and to my parents, Professor and Mrs. J. MacQueen. Errors and blemishes which remain are of course mine alone.

1. *The Register of Briefs 1286-1386* ed. T. M. Cooper (Stair Soc., vol. 10, henceforth *Reg. Briefs*) introduction, esp. at 30. See also his *Selected Papers* (Edinburgh 1957) 228.
2. James Dalrymple, Viscount Stair, *Institutions of the Law of Scotland* (6th ed., Edinburgh 1981) 4, 3, 4-14. For other references see index, s.v. 'Briefe'.
3. H. McKechie, *Judicial Process upon Briefs 1219-1332* (23rd David Murray Lecture, Glasgow, 1956). Cooper acknowledged McKechie's correction before its publication and his own death; see *Selected Papers*, 222, n. 3.
4. A. Harding, 'The medieval briefs of protection and the development of the common law', *Juridical Review* 11 (1966) 115-149.
5. See the first two volumes in the *Regesta Regum Scottorum* series (henceforth R.R.S.).

- both edited by G. W. S. Barrow: *The Acts of Malcolm IV 1153-1165* (Edinburgh 1960) 59-68; *The Acts of William I 1165-1214* (Edinburgh 1971) 69-75.
6. I. D. Willock, *The Jury in Scotland* (Stair Soc., vol. 23) 105-119.
 7. See *Reg. Brevium* 15-16; *Selected Papers* 90-91; 'Freehold in Scots law', *Juridical Review* 57 (1945) 1-5; and his editions of *Regium Majestatem* and *Quoniam Attachiamenia* (Stair Soc., vol. 11) at 243 and 350. Here he states that the latest reported case of Novel Dissaisine which has been noted is *Furman v. Ker* (1469) 1 Br. Supp. 112. The case referred to is however plainly not one of dissaisine, novel or otherwise.
 8. D. M. Walker, 'The development of reparation', *Juridical Review* 64 (1952) 101-134 at 111. Walker otherwise reproduces the views of Cooper on dissaisine: see 106-112. For the 1368 case, see APS i 505.
 9. Willock, *Jury in Scotland*, 132.
 10. *Reg. Brevium*, 14.
 11. Willock, *Jury in Scotland*, 108.
 12. APS i 400, c. 7. Cf. A. A. M. Duncan, *Scotland: The Making of the Kingdom* (Edinburgh 1975) 539-41, esp. at 541 n. 6 which I follow in my summary of the act's provisions; also G. W. S. Barrow, *The Kingdom of the Scots* (London 1973, henceforth Barrow, *Kingdom*) 114.
 13. Raine, *North Durham*, no. 378; Barrow, *Kingdom* 115.
 14. *Durham Dean & Chapter Munimenta*, miscellaneous charters, no. 1263, printed as an appendix to this paper. It is also possible that the brief was one of mortancestor: see below, 33.
 15. *Tractatus de legibus et consuetudinibus regni Anglie qui Glanvilla vocatur* ed. G. D. G. Hall (London 1965, henceforth *Glanvill*) XIII. 37; D. W. Sutherland, *The Assize of Novel Dissaisin* (Oxford 1973, henceforth, Sutherland, *Novel Dissaisin*) 11.
 16. *Brecon's De legibus et consuetudinibus Anglie* ed. G. E. Woodbine trans. with revisions and notes by S. E. Thorne (Harvard 1968 1977) iii 187-8. See also *ibid.*, 199; Sutherland, *Novel Dissaisin* 135 n. 1; *Novae Narrationes* ed. F. Shanks and S. F. C. Milsom (Selden Soc. vol. 80) lxxxiii. On estovers see text, below, p. 39 and notes 111-113.
 17. *Statutes of the Realm* i 84 (c. 25).
 18. Sutherland, *Novel Dissaisin* 63; *Early Registers of Writs* ed. E. de Haas, and G. D. G. Hall (Selden Soc., vol. 87) 32, 72, 215-6; *Novae Narrationes* lxxxiv-lxxxvi, 22, 77-8 and 194-6.
 19. *Early Registers of Writs* 85, 261.
 20. *Coldingham Corresp.*, no. 1. The pair probably refers to the briefs of dissaisine and to the summons of the defender to answer in court.
 21. Printed, W. Ross, *Lectures on the Law of Scotland* (1822) ii 219 note.
 22. Sutherland, *Novel Dissaisin* 64-5.
 23. *Paisley Register* 170. For the other details of the case see *ibid.*, 157-170.
 24. *Reg. Brevium* 40 (no. 21), 62 (no. 107).
 25. Book 1, ch. 4.
 26. Chs. 36 and 53.
 27. *Dunfermline Register* no. 352.
 28. BL MS. Add. 33245, ff. 156 v. - 157 r. I owe this reference to Professor G. W. S. Barrow, APS i 505.
 29. *Couper Angus Chrs.* ii no. 128. I owe this reference to Mr. W. D. H. Sellar.
 31. APS i 706. The *Ordo* runs in the name of William Sinclair earl of Orkney and justiciar south of Forth. Orkney was chancellor 1454-56 (*British Chronology* 175) and acted as justiciar at that time: ER vi 386, 433 and 485.
 32. *Coldingham Corresp.*, no. 1.
 33. APS i 470, c. 13; *ibid.*, 471, c. 19.
 34. *Arbroath Liber* i no. [360]. Compare the English letters close giving the beneficiary respect from actions other than novel dissaisin, darrein presentment and dower *unde nihil habet* discussed in Sutherland, *Novel Dissaisin* 54-5.
 35. *Regium Majestatem* III, 32; *Glanvill* XIII, 32.
 36. Sutherland, *Novel Dissaisin* 55-7.

37. *ibid.*, 139.
38. APS i 470, c. 13. I differ from Lord Cooper's rather free translation of this statute (*Selected Papers* 90) in one important aspect. He takes the passage '*vult dominus rex ei statui quod de cetero ille bene nominentur in brevi de nova dissaisina dissaior sicuti tenens eius et infidelior si sui vivus*' to mean, 'It is hereby enacted that it shall be competent for the future to call as defenders to a brief of novel dissaisin (a) the original intruder, (b) the person in actual possession of the lands, and (c) if he is still alive, the person from whom the lands were derived by the person in actual possession'. I suggest that as the verb *nominentur* is in the subjunctive form and in a *quod* clause following words of command it ought to be translated 'they shall be named'. In other words the act is not merely permitting the pursuer to call the dissaior and feoffor as defenders, it is compelling him to do so. This reading also balances the rather puzzling '*sicuti tenens eius*' with '*viva bene*'. I read the passage as follows: 'The lord king wills and enacts that from now there shall also be named in the brief of novel dissaisin the dissaior as well as his [i.e. the dissaisine's] tenant and the feoffor if he is living'. I think that this reading is the most consistent with the act as a whole.
39. Sutherland, *Novel Dissaisin* 57.
40. *ibid.*, 139-141.
41. F. Pollock and F. W. Maitland, *History of English Law* (2nd. ed. reissued Cambridge 1968) ii 56; Sutherland, *Novel Dissaisin* 58.
42. *ibid.*, 141-2.
43. *Regium Majestatem* III, 32; *Quoniam Attachiamenia* ch. 36; *Couper Angus Chrs.* ii no. 128.
44. *Regium Majestatem* III, 32; *Glanvill* XIII, 38.
45. Sutherland, *Novel Dissaisin* 131 and 218.
46. *Reg. Brevium* 39 (no. 16). See also *ibid.*, 43 (no. 36), 54 (no. 16) and *Quoniam Attachiamenia* chs. 38 and 56.
47. *Regium Majestatem* I, 15; *Quoniam Attachiamenia* ch. 38; *Reg. Brevium* 61 (no. 96); and see below, 42.
48. G. W. S. Barrow, *Robert Bruce* (2nd ed., Edinburgh 1976, henceforth Barrow, *Bruce*) 417.
49. There seems to be no evidence to show that in Scotland the tenant could vouch a co-defender in dissaisine as his warrantor and then drop out of the action. Clearly this would not be possible before 1318 if only the tenant was named as defender; it would have been possible from 1318, but there is no express provision in the act about this. The question arises because such a rule developed in England once it became possible to sue both dissaior and tenant in the one action: Sutherland, *Novel Dissaisin* 218-19. This was in addition to the action by *warrantia carte*.
50. *Regium Majestatem* III, 32; *Quoniam Attachiamenia* ch. 36.
51. Barrow, *Bruce* 380-92.
52. APS i 471, c. 19.
53. *Regium Majestatem* III, 32; *Glanvill* XIII, 38.
54. APS i 473, c. 25.
55. *Statutes of the Realm* i 35 (c. 37); Sutherland, *Novel Dissaisin* 134, 219-20.
56. *Reg. Brevium* 40 (no. 21), reading with Cooper (see *ibid.*, 15) *nondum* for the original's *dum*, which makes no sense in the context.
57. Sutherland, *Novel Dissaisin* 12-13, 32, 135-8.
58. Ch. 53.
59. *Reg. Brevium* 62 (no. 107) gives only a brief summary of the original which I have examined in a photostat copy. Edinburgh University Library. Phot. 1141, f. 33.
60. *Regium Majestatem* IV, 40. See Lord Cooper's edition (Stair Soc. vol. 11) 296-7 and his 'Freehold in Scots law', *cit.* above, note 7. I am indebted to Mr. W. J. Windram for the information that the *Liber de Iudiciis* contains a similar if rather simpler passage.
61. See W. C. Dickinson, 'Freehold in Scots law', *Juridical Review* 57 (1945) 135-151. Two examples ten years before the earliest noted by Dickinson are printed in RRS vi (The Acts of David II 1329-1371 ed. B. Webster, Edinburgh 1982) nos. 266 (1361) and 269 (1362).
62. APS i 505.
63. APS ii 32, c. 2.

64. So similar are the styles of dissasine and *aqueductum* that Cooper and Walker mistake the *aqueductum* in St. Andrews *Formulare* i 254 for a dissasine: Reg. Brieves 41. *Juridical Review* 64 (1952) at 111 n. 84.
65. Sutherland, *Novel Dissaisin* 63, 216-217.
66. Ibid. 97-104.
67. Pollock and Maitland, *History of English Law* ii 52.
68. APS ii 254, c. 41.
69. *Dunfermline Registrum* nos. 82, 83.
70. Reg. Brieves 40 (no. 20), 62 (no. 106).
71. *Regium Majestatem* III, 24 and 25; *Quoniam Attachiamenia* chs. 35 and 52.
72. Following Balfour, *Practicks* ii 644-6. It is not true to say, as Cooper does (Reg. Brieves, 14) that the term mortancestor's is of very frequent occurrence in Scottish charter records of the thirteenth century as a description of the brief of succession or, indeed, at all.
73. See note 71 above and APS i 471, c. 19.
74. APS i 472, c. 23.
75. Reg. Brieves 14-15; Pollock and Maitland, *History of English Law* ii 57.
76. *Regium Majestatem* I, 4; III, 24.
77. See Pollock and Maitland, *History of English Law* ii 571 and note 2; also 572.
78. *Novae Narrationes* lxxxiii.
79. Ibid. lxxxiv, lxxxv; *Roll of the Shropshire Eyre of 1256* ed. A. Harding (Selden Soc. vol. 96) xxx.
80. *Glasgow Registrum* nos. 130, 131 and 172; Barrow, *Kingdom* 115-6. For another possibility see H. L. MacQueen, 'The brief of right in Scots law', *Journal of Legal History* iii (1982) 52-70 at 52-3 and 55.
81. See notes 70 and 71 above; also *Regium Majestatem* I, 4.
82. Reg. Brieves 61 (no. 96).
83. APS i 479.
84. RRS vi no. 417.
85. *Spalding Misc.* ii 319.
86. *Aberdeen - Banff Illustrations* iii 263.
87. *Morton Registrum* ii no. 107.
88. RRS vi, index, 569 (s.v. 'brieves'). It is also correctly noted as 'brief of mortancestor' later on in the index.
89. RRS vi no. 503; index, 569 (s.v. 'brieves').
90. Fraser, *Douglas* iii nos. 301, 302.
91. APS i 706.
92. *Morton Registrum* ii no. 223.
93. *Alisa Muniments*, SRO, GD 25/1/102.
94. *Acta Auditorum*, 12.
95. APS ii 101.
96. *Acta Auditorum*, 66.
97. W. C. Dickinson, 'The acts of the parliament at Perth 6 March 1429/30', *Scottish Historical Review* 29 (1950) 1-12 at 5-9.
98. See e.g. Dickinson, op. cit. 6, 8; C. D'O. Farran, *Principles of Scots and English Land Law* (Edinburgh 1958) 98-102, 158-163; A. W. B. Simpson, 'Enails and perpetuities', *Juridical Review* 24 (1979) 1-20 at 19; R. Burgess, *Perpetuities in Scots Law* (Stat. Soc. vol. 31) 66-73.
99. *Regium Majestatem* IV, 40 and see note 60 and accompanying text above.
100. RRS vi no. 417.
101. *Morton Registrum* ii no. 70.
102. *Scots Peerage* vi 341-3. See also a note by W. D. H. Sellar in the forthcoming *Miscellany II of the Stair Society*, Fraser, *Douglas* i 253-4, and G. Neilson *Trial by Combat* (Glasgow 1890) 216-17.
103. *Statutes of the Realm* i 71-2 (c. 1); A. W. B. Simpson, *Introduction to the History of the Land Law* (Oxford 1961) 78.
104. S. F. C. Milsom, 'Formedon before De Donis', (1956) 72 *Law Quarterly Review* 391-397, esp. at 394; Pollock and Maitland, *History of English Law* ii 28-9.

105. *Alisa Muniments*, SRO, GD 25/1, 20.
106. APS ii 254, c. 41. See above, 31-2.
107. St. Andrews *Formulare* i 223.
108. Balfour, *Practicks* ii 420-33; J. Skene, *De Verborum Significatione* (Edinburgh 1597) s.v. 'Breve de morte antecessoris'.
109. See especially his *Legal Framework of English Feudalism* (Cambridge 1976, henceforth Milsom, *Framework*) and *Historical Foundations of the Common Law* (2nd ed., London 1981), chs. 5 and 6.
110. See *Dunfermline Registrum* nos. 180, 185, 194, 195, 303.
111. W. S. Holdsworth, *History of English Law* (1966 reprint) iii 143; vii 306, 315.
112. See appendix and Raine, *North Durham* no. 357.
113. Ibid., no. 418. 'Exorsers seems also to have been used in medieval Scotland with the wider meaning of 'necessaries, maintenance, support'. See references in Du Cange, *Glossarium* *Mediæ et Infimæ Latinitatis* and Skene, *De Verborum Significatione*, both s.v. 'exorsarium'. For an example of the use of the word in this sense in a document of 1238 see *Arbroath Liber* i no. [261].
114. See his introduction to Pollock and Maitland, *History of English Law* i, xlii-xliii; also Milsom, *Framework* 13.
115. *Glasgow Registrum* 5, 7, 23, 30, 43, 50, 55.
116. Ibid., no. 131.
117. Ibid., nos. 104 and 105.
118. Ibid., nos. 126, 127 and 128.
119. Raine, *North Durham* nos. 375-387.
120. See Milsom, *Framework* 18-21.
121. Sutherland, *Novel Dissaisin* 30-31. An important new contribution is R. C. Palmer, 'The feudal framework of English law', *Michigan Law Review* 79 (1981) 1130-1164.
122. See *Arbroath Liber* i nos. [247] and [311] for thirteenth century leases of the lands; RRS vi no. 29 (*Arbroath Liber* ii no. 17) for royal confirmation of 1341; above, note 28, for case of dissasine; *Arbroath Liber* ii no. 19 for subsequent lease. The lands were again in dispute in the 1350s: RRS vi nos. 124 and 133, *Arbroath Liber* ii no. 27. See also RRS vi nos. 13 and 182.
123. See RRS i app. 2 nos. 31, 385 and 389; *Yester Writs* nos. 21, 23, 37, 39, 41A, 42-51, 68A, 70A, and 106.
124. *Morton Registrum* ii no. 107.
125. *Aberdeen - Banff Illustrations* iii 263.
126. RMS i app. 1 no. 47; *Scots Peerage* vi 30-38.
127. See A. Grant, 'The higher nobility in Scotland and their estates c. 1371-1424' (Oxford University D. Phil., 1975) 197-211.
128. Both at APS i 575.
129. *Alisa Muniments*, SRO, GD 25/1/9, 14, 20, 24, 31, 59, 97-105; *Wigtown Charter Chest* nos. 25-42, 413, 414; RMS ii no. 874.
130. *Alisa Muniments*, SRO, GD 25/1/97.
131. Reg. Brieves 61 (no. 96).
132. *Morton Registrum* ii no. 130.
133. Ibid., ii nos. 100 and 101 (see also nos. 136, 141 and 142); RRS vi no. 105.
134. Sutherland, *Novel Dissaisin* chs. 4 and 5.
135. Milsom, *Framework* 5.

APPENDIX

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DURHAM D. & C. MUNIMENTS, Misc. Ch. no. 1263.

Hec est finalis concordia facta inter dominum Anknetinum priorem de Coldingham et conventum, tenentes, et Edam et Mariam de Paxton, sorores, et earum heredes, et Willelmum de Paxton, filium dicte Ede, petentes per breve domini regis de recognitione directum domino Willelmo de Lindsey tunc vicecomiti de Berwic et eius ballivis super quodam bosco vocato Ristoneside, scilicet, quod solium eiusdem bosci et custodia dictis priori et conventui et eorum successoribus remanebant in perpetuum tali siquidem condicione, quod dicti Eda, Maria et earum heredes et Willelmus de Paxton racionabilia estoveria sua propria tam in domibus et scipibus construendis quam estoveriis carrucarum per visum forestarii dictorum prioris et conventus libere percipient ad usus suos proprios de Aldenecrawe et dictus prior et conventus et eorum successores dictum boscum adeo bene sine wasio et destructione custodiri facient quod dicti Eda, Maria et earum heredes et Willelmus de Paxton de omnibus in dicto bosco crescentibus racionabilia estoveria sua per visum forestarii sicut predictum est possint percipere. Et ut hec finalis concordia perpetuam optineat stabilitatem scriptum istud in modum cirographi est confectum cuius parti penes priorem et conventum residenti sigilla Ede, Marie et Willelmi filii Ede apponuntur pars vero penes partes prenominate deposita sigillis [sic] capituli Dunelmensis et domini Anknetini prioris roboratur. Teste curia domini regis apud Berwic in pleno comitatu.

Translation

This is the final concord made between the lord Anknetin, prior of Coldingham, and the convent, defenders, and Eda and Maria of Paxton, sisters, and their heirs, and William of Paxton, son of the said Eda, pursuers by the lord king's breve of recognition addressed to the lord William Lindsay, then sheriff of Berwick, and his bailies, concerning a certain wood called Restoneside, namely, that the ground and ownership of the same wood should remain with the said prior and convent and their successors in perpetuity, but under a certain condition, that the said Eda, Maria and their heirs and William of Paxton shall freely occupy to their own use their own reasonable estovers of Auchencrow, both in the building of houses and hedges and in estovers of ploughs, under the view of the foresters of the said prior and convent, and the said prior and convent and their successors shall act to protect the said wood so well without waste or destruction that the said Eda, Maria and their heirs and William of Paxton shall be able to occupy their reasonable estovers of everything growing in the said wood under the view of the foresters as is aforesaid. And so that this final concord shall possess perpetual validity this deed is made in the form of a chirograph, to the part of which remaining in the possession of the prior and convent the seals of Eda, Maria and William, son of Eda, are affixed; however the part deposited in the possession of the forenamed parties is confirmed by the seals of the chapter of Durham and of the lord Anknetin, prior. Witness the court of the lord king at Berwick in full county.

NOTES

- (i) The document is misleadingly discussed in M.L. Anderson, *A History of Scottish Forestry* (1967) i 100 and is referred to in the *Handlist of Acts of Alexander II 1214-1249* compiled by J.M. Scouler for the *Regesta Regum Scottorum* series (Lost Acts, no. 388). There are two seal tags on the document, suggesting that it is the half which was given to the family of Paxton; it may be that its presence at Durham can be explained by extinction of heirs leading to all the documents agent the property being called in by the superiors. It is to be noted that in 1235 it was settled that the heirs of Paxton and Auchencrow owed homage, relief and marriage to Durham and not to Coldingham, a question previously in doubt (*Coldingham Corresp.*, no. 239).
- (ii) *Anknetin prior of Coldingham*: The document gives only the initial 'A', but there can be no doubt of his identity (cf. Raine, *North Durham* nos. 253, 339, 362, 365, 426 and 427). Dated documents show him to have been prior in 1239 (Raine, *North Durham* no. 272) and probably in January 1240/1 (Raine, *North Durham* nos. 479 and 480). His latest known predecessor was Thomas de Melanby, who was elected prior of Durham in 1233, and his successor, Richard, was in office by October 1245 (see A.A.M. Duncan, *The Bithliothek* 2 (1959) at 8-9).
- (iii) *Eda, Maria and William of Paxton*: In 1236 lady Eda of Paxton, her first-born son Robert, her sons Robert (presumably a different Robert) and William, both clerks, and her daughters Cecilia and Matilda granted a nine year lease of the fisheries at Paxton upon Tweed which was confirmed by the prior and convent of Durham, presumably as accepted superiors of the lands following the dispute of 1235 (Raine, *North Durham* no. 358).
- (iv) *William Lindsay, sheriff of Berwick*: In an unpublished handlist of the *Sheriffs of Scotland before c. 1306*, Professor Barrow assigns William Lindsay's sheriffship to the period c. 1233 to c. 1240 (Raine, *North Durham* nos. 394 and 426). In the latter document, William's name appears alongside that of prior Anknetin.
- (v) *'Aldenecraw'*: This is clearly modern Auchencrow, a hamlet in Berwickshire (Ordnance Survey NT 853 607) two miles south-west of the village of Reston (Ordnance Survey NT 884 620). It should be noted that at the present time Auchencrow is pronounced 'Edincraw' locally (and see W.F.H. Nicolaisen, *Scottish Place Names* (1976), 126).
- (vi) *Date*: Anderson dates the document to 1249: this is clearly wrong. Scouler suggested sometime between 1226 and 1247. It is submitted that this can be narrowed down. The nature of the right of estovers (see text above, 39) suggests that at the time of the case Coldingham priory was regarded as the superior of the lands of Paxton and Auchencrow. As shown above, from 1235 this was no longer so. Anknetin may well have been prior of Coldingham from 1233. Accordingly the document can be placed sometime in the years from 1233 to 1235. Perhaps the dispute about the superiority between Coldingham and Durham was the reason why the seals of both were affixed to confirm or strengthen the document given to the family of Paxton, even though Durham was not party to the concord.

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